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Supreme Court of the United States

OCTOBER TERM, 1966

No. 498

SAMUEL MOSLEY,

Respondent,

against

CIA. MAR. ADRA S.A.,

Respondent,

against

LIPSETT STEEL PRODUCTS, INC.,

Petitioner.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT ON BEHALF OF LIPSETT STEEL PRODUCTS, INC.

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TO THE HONORABLE THE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Petitioner Lipsett Steel Products Inc., prays that a writ of certiorari be issued to review the decision and judgment of the United States Court of Appeals for the Second Circuit filed June 16, 1966 and the orders denying a petition for rehearing and rehearing in banc, filed July 22, 1966 affirming judgments entered in the United States District Court for the Southern District of New York, the first in favor of the respondent longshoreman Samuel Mosley for personal injuries against the respondent shipowner Cia Mar Adra S. A., in the sum of $125,000 entered January 28, 1966 on a general jury verdict and the second in favor of respondent Cia Mar Adra S. A. against

the stevedore petitioner, Lipsett Steel Products Inc., in the sum of $125,000 for indemnity entered January 28, 1966 in accordance with the memorandum opinion dated January 27, 1966 of District Judge Lloyd McMahon granting the motion of Cia Mar Adra S. A. for judgment notwithstanding the verdict of the jury.

The opinion of District Judge McMahon granting judgment n.o.v. against petitioner on the ground "that the verdict in its favor is against the weight of the evidence" is included in the appendix to this petition. The opinion of Judge Paul R. Hays of the United States Court of Appeals speaking for the majority, as well as the dissenting opinion of Judge Henry J. Friendly are reported at 362 Fed. 2d 118 and is included in the appendix to this petition (A, pp. 18 and 26, respectively).

Judgments entered after a prior trial of this case were reversed and the case was remanded for a new trial by the Court of Appeals, the opinions appearing in 314 F. 2d 223. Certiorari was denied 375 U. S. 829.

At the second trial the shipowner's liability for unseaworthiness alone was litigated, inasmuch as the claim based on negligence already had been dismissed.

No special questions were given to the jury in the instant trial and it returned general verdicts in favor of the longshoreman against the shipowner and in favor of the stevedore against the shipowner on indemnity.

Jurisdiction

Jurisdiction to review the judgments by writ of certiorari is found in 28 U.S.C. 1254 (1) and 2101 (c), as well as rule 19 (1b) of this court.

Questions Presented for Review

I

Is it not contrary to the Seventh Amendment for:

a—A trial court to grant judgment n.o.v. against a party on the stated ground "that the verdict in its favor is against the weight of the evidence" and on a finding of fact directly contrary to the jury's finding on the same fact?

b—The Court of Appeals in affirming, to quote and rely on the trial court's abortive finding of fact?

c—The Courts below to dispense with a motion for a directed verdict as a prerequisite to judgment n.o.v.?

II

Is not the shipowner precluded from indemnity where the jury was charged that it could find unseaworthiness because of:

"the type of operation that was going on" and "the condition of the deck",

an activity and a result required of the petitioning stevedore?

III

In charging a jury as to unseaworthiness:

a. Should the negligence concept of "safe place to work" be equated with "fitness for intended use" so that a shipowner has an absolute duty to provide a longshoreman "a safe place to work"?

b. Is it correct to say that a shipowner owes to a longshoreman who is loading scrap iron, an absolute duty to provide and maintain the place of loading so that the longshoreman may "perform his work in the task assigned to him in reasonable safety"?

c. Is it proper to say that a ship not only must be reasonably fit but that also and in addition, the area where a stevedore is loading scrap iron must be reasonably safe under all the circumstances and all the conditions encountered during such loading, including the loading itself?

IV

Does judgment against a shipowner which results from a faulty and improper charge as to unseaworthiness, furnish a proper base on which to rest indemnity over against a stevedore?

Statement of the Case

Samuel Mosley, plaintiff below, and a citizen of New Jersey brought suit in the United States District Court for the Southern District of New York against Cia Mar Adra S. A., a Liberian corporation, to recover damages for injuries allegedly sustained by him on the SS Turmoil owned by Cia Mar Adra S. A. while he was working as a longshoreman in the employ of petitioner Lipsett Steel Products, Inc., a New York corporation. Jurisdiction was invoked under 28 U.S.C. 1332. Cia Mar Adra S. A. filed a third-party complaint against petitioner in which indemnity was sought. Plaintiff's claim based on alleged unseaworthiness of the vessel was submitted to the jury (his claim of negligence was dismissed on an earlier trial) and the jury returned a verdict in plaintiff's favor of $125,000 against Cia Mar Adra S. A. On the indemnity claim of Cia Mar

Adra S. A. the jury returned a verdict in favor of the petitioner, Lipsett.

Stationed in the tween deck of No. 5 hold of the ship, into which scrap iron was being loaded by use of a chute, Mosley noted that the chute had become jammed by an automobile rear end. In attempting to free the jammed rear end he claims that he injured cervical vertebrae 5 and 6.

Using a six feet long metal bar with a hook on the end, he tried to pull the heavy automobile rear end over the side of the chute which was 2½ to 3 feet deep. He used all his strength and weight and because of the position and height of the automobile rear end in the chute, he had to pull with his hands elevated to eye level. Scrap metal was being loaded all over the deck of the tween deck where the longshoreman was. Mosley admitted that he knew he was standing on scrap metal when he pulled and tried to dislodge the rear end. He made no effort to clear away any of the scrap in order to give himself good footing. As he continued to pull with all his strength and weight his feet slipped and he fell backwards. He complained of pain in his leg. For the balance of the day he remained on the ship which was moored to a dock. On the following two days he went to meetings and returned to his regular work on the third day. For at least four months after this occurrence he performed his regular longshoreman's work. Six months after the instant occurrence, operative intervention revealed a ventral herniated disc C5—C6.

In 1933 the plaintiff longshoreman had been knocked unconscious when he was in the hold of a ship and a load of lumber fell on him, striking his head, neck, shoulders and other parts of his body. Taken by ambulance he was confined in a hospital for 19 days on that occasion. His own doctor admitted at the instant trial that a herniated disc could take many years to develop or many

years to evidence itself, and it could be present and never reveal itself.

According to the proof herein, no defect or unfitness in the hull, gear, machinery, or appurtenances of the ship directly visited harm on the plaintiff longshoreman. If he sustained injury at the time complained of, the proof clearly demonstrated that it was brought about by what he himself did and how he did it. As he pulled with all his might and weight against an immovable force, something had to give. Thus the manner in which the claimed injury allegedly was sustained excluded the possibility that unseaworthiness played any part in it until the Court charged the jury:

> "The law requires, the maritime law, that the owner of a vessel maintain it in a seaworthy condition."
>
> • • •
>
> "Specifically here the question which you have to decide is whether under all the circumstances the tween deck area was reasonably fit to permit the plaintiff to perform his work with reasonable safety. And here you have to take into consideration all of the conditions then obtaining, the type of operation that was going on, the lighting conditions, the chute, the kind of chute it was, the condition of the deck.
>
> • • •
>
> But consider all the conditions and whether under all of those conditions that area was reasonably fit for the plaintiff to perform his work in the task assigned to him with reasonable safety.
>
> • • •
>
> On the other hand, if you find it was unfit, that it was not reasonably fit and reasonably safe, then you should find that it was unseaworthy • • •."

Exception was taken to the charge on the ground that the negligence doctrine of safe place to work was foreign to the seaworthiness concept—"it is the fitness of the vessel itself for its intended use which is seaworthiness not conditions generally".

In charging the jury on indemnity the court specifically charged:

> "If the stevedores created an unseaworthy condition * * * the ship in that situation can recover over against the stevedores for all the loss and damages to which it has been put."

The jury verdict in favor of the stevdore was its answer to this question. But in setting aside the jury verdict in favor of the stevedore on indemnity and granting judgment n.o.v. the court expressly held:

> "Here there is no question but that any unseaworthy condition obtaining in the tween deck area was created by the stevedore and that the verdict in its favor is against the weight of the evidence." (Appendix B, p. 30)

The majority opinion of the Court of Appeals quotes and rests on this finding of fact of the trial court, even though it is contrary to the jury's finding (Appendix A, p. 25).

Testimony from the longshoreman plaintiff, as well as from the ship's chief mate, clearly established that the ship's officers exercised a continuous and regular supervision and control over the loading. Ship's officers regularly were present "to see that the ship was trimmed properly" and to protect against damage. After the chute was positioned, "a position run" always was made in the presence of an officer of the ship.

The petitioner admitted in its answer to the third party complaint that it had contracted to load the ship with scrap

iron. Cia Mar Adra S. A. the shipowner, however did not prove any of the terms of the contract nor did it prove what the petitioner was required to do in order to render workmanlike service. After all the evidence was in the court said:

> "I don't remember any proof about performance under the contract at the moment that I recall. Just a moment.
>
> Do you have any evidence here on the third-party situation, Mr. Cichanowicz, other than the fact that the stevedore was on board and performed the work. You have that, but what else?
>
> • • • • • •
>
> All right, it is your case, not mine. If you haven't enough it is going to be your tough luck."

In the court's post trial memorandum granting judgment n.o.v., filed a month after the conclusion of the trial and without the benefit of a transcript of any of the testimony according to the shipowner's brief, the court clearly demonstrates that it is unable to determine the basis on which the jury held that the ship was unseaworthy. The court concedes that the jury might have found the vessel to be unseaworthy from any one or a combination of a number of elements, but which one or how many the court cannot say. Thus the court confesses that it has absolutely no idea of what condition or conditions, what circumstance or circumstances were rested on by the jury in rendering a verdict for the plaintiff longshoreman (Appendix B, p. 29).

At the conclusion of all the evidence, the shipowner did not make a motion for a directed verdict as to the third party complaint nor did it "state the specific grounds therefor" as required by F.R.C.P. Rule 50 a & b. The only motion for a directed verdict which the shipowner made was expressly directed to the plaintiff's complaint

and that motion plainly stated "the evidence is insufficient on which to go to the jury." That motion is quoted by the Court of Appeals (Appendix A, p. 24). Thus an affirmative judgment against the stevedore for $125,000 is made to rest on "insufficiency of evidence". Not a word was said by the shipowner at the conclusion of the evidence which asked for a directed verdict and a money judgment against the stevedore on the third-party complaint. Even if the plaintiff's complaint had been dismissed for lack of proof or otherwise, the shipowner could have sought judgment on the third party complaint against the stevedore under recent decisions of the 2nd Circuit. *Damanti* v. *a/s Inger*, 314 F. 2d 395, cert. den. 375 U. S. 884, *Massa* v. *C. A. Venezuelan Navigacion and John W. McGrath Corp.*, 332 F. 2d 779.

Reasons for Granting the Writ

The decision below can not escape having a tremendous effect on any jury trial which hereafter may occur as well as to add to the constantly mounting confusion, as evidenced by reported decisions, as to what constitutes unseaworthiness. Lawyers and judges, could point to this case to demonstrate how far a trial court may go in substituting its judgment of the facts for the judgment of the jury. Again they may point to this case as demonstrating that the requirements of the Common Law and of F.R.C.P. Rule 50 a & b, involve provisions which may be dispensed with in the discretion of the court. Still further, this case may be relied on to demonstrate that in suits of longshoremen injured on shipboard which constitute such a large bulk of the litigation in our Federal Courts, the maritime law as to what constitutes unseaworthiness, is not limited or defined by decisions of this court, but that it is subject to unlimited enlargement in scope by the several trial courts and Courts of Appeals throughout the country.

I

Judgment n.o.v. never may be granted on "Weight of the evidence". A new trial may be. *Montgomery Ward v. Duncan*, 311 U. S. 243 at 249.

When the trial court granted judgment "on the ground that the verdict in its favor is against the weight of the evidence", it was an improper usurpation of the function of the jury. *Berner* v. *British Commonwealth Pacific Airlines Ltd.* (CA2), 346 F. 2d 532 at 536, *Tennant* v. *Peoria & Pekin Union R. Co.*, 321 U. S. 29 at p. 35; *Lavender* v. *Kurn*, 327 U. S. 645 at 653; *Dick* v. *New York Life Ins. Co.*, 359 U. S. 437; *Mercer* v. *Thierot*, 377 U. S. 152.

The trial court confesses it does not know on what bases the jury found the ship to be unseaworthy, the jury was not asked to answer special questions and there is no way of knowing what inferences the jury drew from any of the testimony, either as to the ship's liability or on indemnity.

The testimony established that the stevedore was required to load the scrap all over on the deck of the tween deck, and the jury was justified in concluding that the scrap on which the longshoreman was standing and on which his feet slipped when he was pulling, was not an unseaworthy condition "created by the stevedore". The doubt expressed by the trial court at the trial as to whether the claim for indemnity had been proved, the constant supervision of loading by the ships personnel and our utter ignorance as to the basis on which the jury found the vessel to be unseaworthy emphasizes the conflict with this court's language in *Atlantic and Gulf Stevedores, Inc.* v. *Ellerman Lines, Ltd.*, 369 U. S. 355 at 364:

> "For a search for one possible view of the case which will make the jury's finding inconsistent results in a collision with the Seventh Amendment."

The instant decision is in conflict with the decision of the Fifth Circuit in *Waterman SS Corp.* v. *David,* 353 F. 2d 660 wherein this court denied certiorari June 6, 1966.

Rule 50a requires a movant for a directed verdict to

"state the specific grounds therefor".

The shipowner's motion addressed to plaintiff's complaint, quoted by the Court of Appeals* and branded as "ambiguous", sought a direction on grounds directly opposed to those on which a direction as to the third party complaint would have been requested and which in fact was the basis for the trial court granting judgment n.o.v. As to the plaintiff's complaint, the shipowner claimed an "insufficiency" of evidence (Appendix, p. 24). As to indemnity, the trial court held it had been proved by the "weight of the evidence" (Appendix, p. 30).

The statement of the Court of Appeals (Appendix A, p. 25) that the requirement of Rule 50b is "harsh in any circumstances" and the action of the Court of Appeals herein can not be reconciled with this Court's language in *Johnson* v. *N. Y., N. H. & H. R. Co.,* 344 U. S. 48 at 52:

> "Rule 50b was designed to provide a precise plan to end the prevailing confusion about directed verdicts and motions for judgments not withstanding verdicts."

The language and action of the Court of Appeals suggests that it is preempting a rule making power which has not been vested in it.

The requirement in Rule 50b that a motion be made for a directed verdict as a prelude to judgment n.o.v., is no innovation. It was the rule before Rule 50b was enacted.

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* The Court of Appeals inverts the correct order of the motions made.

It did not impose a new condition. It was part of the common law rule. It can not be dispensed with.

> *Baltimore & C. Line* v. *Redman*, 295 U. S. 654 at 660 (1935).

Since the Seventh Amendment forbids reexamination of the facts in a case, except according to common law principles, and since the necessity of a motion for a directed verdict existed under the common law, *Baltimore & C. Line* v. *Redman, supra* it matters little whether we feel that Rule 50b is "harsh in any circumstances". A motion for a directed verdict does not involve a question of preserving a party's "right to make an n.o.v. motion" as the Court of Appeals said it did (Appendix A, p. 25). Such a motion, instead confers jurisdiction on the Court to rule on n.o.v. after the jury returns its verdict. *Baltimore & Carolina Line* v. *Redman, supra.* Failure to make such a motion deprives the Court of jurisdiction to rule on n.o.v.

The Fifth Circuit recently said (May 17, 1966) in *Pennsylvania National Mutual Casualty Ins. Co.* v. *Nathan*, 361 F. 2d 18 at 20:

> "As we have said time and again, 'When a party allows a case to go to the jury without challenging the sufficiency of the evidence by a motion for a directed verdict, the appellate court is powerless to review the sufficiency of the evidence to support the verdict'."

II

Considerable confusion and doubt has arisen as to the proper meaning and application of this court's language in *Weyerhaeuser SS Co.* v. *Nacirema Operating Co.*, 355 U. S. 563, when it said at p. 567, that the shipowner

> "was entitled to indemnity absent conduct on its part sufficient to preclude recovery."

When the jury herein was told that it could find the vessel unseaworthy because of "the type of operation that was going on" and "the condition of the deck," it was in effect told that what the shipowner required petitioner to do, namely to load scrap and to load the scrap on the deck, could render the ship unseaworthy.

If unseaworthiness could be found on this basis, does not this preclude indemnity since the stevedore was required by the shipowners to do exactly what it did. Is this not indemnity precluding conduct under the Weyerhaeuser doctrine?

III

What constitutes unseaworthiness and what is the proper application of the rule are matters as to which there is increasing disagreement and confusion of late. The First and Sixth Circuits, as well as a substantial portion of the Second Circuit adhere to the rule that segments of the vessel itself must be defective or unfit to render her unseaworthy and that neither conditions generally, nor an unsafe place to work, come into play in unseaworthiness. *Arena* v. *Luckenbach SS Co.* (CA 1), 279 F. 2d 186, cert. den. 364 U. S. 895; *McKnight* v. *N. M. Patterson & Sons* (CA 6), 286 F. 2d 250, cert. den. 368 U. S. 913; *Waldron* v. *Moore-McCormack Lines* (CA 2), 356 F. 2d 247, January, 1966. Directly opposed are the Third, Fourth and Ninth Circuits. *Spann* v. *Lauritzen* (CA 3), 344 F. 2d 204, at 209, cert. den. 382 U. S. 1000; *Huff* v. *Matson Navigation Co.* (CA 9), 338 F. 2d 205 at 212, cert. den. 380 U. S. 943; *Ballwanz* v. *Isthmian Lines, Inc.* (CA 4), 319 F. 2d 457.

The Fifth Circuit has expressed conflicting views—*McQuiston* v. *Freighter & Tankers SS Co.*, 327 F. 2d 746, *Mills* v. *Mitsubishi Shipping Co.*, 358 F. 2d 609. Petition for certiorari filed July 18, 1966.

The disagreement among the several judges of the Second Circuit Court of Appeals is sharp and apparently

irreconcilable: On January 31, 1966 in *Waldron* v. *Moore-McCormack Lines*, 356 F. 2d 247, at p. 251, Judges Medina and Lumbard refused to hold "that any condition aboard ship that is of potential danger * * * is necessarily a condition of unseaworthiness * * *." Judge Smith dissented. Petition for certiorari was filed June 15, 1966. On March 31, 1966 in *Skibinski* v. *Waterman SS Corp.*, 360 F. 2d 539, Judges Hays and Dooling rejected recent decisions of the same court and Judge Friendly dissented. Petition for certiorari was filed July 22, 1966. On June 16, 1966 (herein) in *Mosley* v. *Cia Mar Adra S A and Lipsett Steel Products* —— F. 2d —— Judges Hays and Feinberg held that a shipowner *warrants* to a longshoreman "a safe place" to work (Appendix A, p. 23) and that conditions generally may render a vessel unseaworthy. Judge Friendly dissented. On July 18, 1966 in *Radovich* v. *Cunard SS Co.*, —— F. 2d ——, Judges Feinberg and Smith imposed liability on a ship for unseaworthiness because a stevedore had "created a dangerous condition." Judge Irving Kaufman dissented and termed the majority's distinctions "words and phrases that are like beads of quicksilver." What is said in *Skibinski, Mosley* (instant case) and *Radovich* has completely emasculated *Puddu* v. *Royal Netherlands SS Co.*, CA 2, decided en banc in 1962, 303 F. 2d 752, cert. den. 371 U. S. 840 reh. den. 371 U. S. 917.

The instant case pointedly presents the very issue about which there is so much disagreement, namely whether a shipowner warrants to a longshoreman a safe place to work and whether circumstances and conditions generally may be used by a jury as a basis for holding a vessel to be unseaworthy.

The decisions of this Court, although not passing directly on the point, seem to indicate that "safe place to work", a negligence doctrine, has no proper place in considering seaworthiness. *M. V. Tungus* v. *Skovgaard*, 1959, 358 U. S. 588 at 594; *West* v. *U. S.*, 1959, 361 U. S. 118 at 122-

123; *Morales* v. *City of Galveston*, 370 U. S. 165 at 170 and 171.

In *Mitchell* v. *Trawler Racer, Inc.*, 362 U. S. 539 at 550, this court pointed out:

> "What has evolved is a complete divorcement of unseaworthiness liability from concepts of negligence."

Never, has this Court held that seaworthiness depends on "all the circumstances *** all the conditions" or on whether "the area was reasonably fit for the plaintiff to perform his work in the task assigned to him with reasonable safety". No decision by this Court has held that a vessel, in addition to being reasonably fit, must also be reasonably safe in order to be seaworthy, which was the charge given to the jury herein.

It seems that a misunderstanding of the language in this court's opinion in *Mitchell* v. *Trawler Racer, Inc.*, 362 U. S. 539, has given rise to erroneous statements as to what constitutes unseaworthiness. The basic holding of that case, that notice of unseaworthiness is not an essential to liability, is well understood, but the references to "unseaworthy condition" (549) and "transitory unseaworthiness" (542) seem to be given a meaning which never was intended. Taken in the context in which these phrases are found, they relate to a specifiic part of the ship, the rail, which may have been rendered unfit by the presence of slime and fish gurry. Taken out of context, they are improperly used as a basis for the court's charge herein:

> "but consider all the conditions and decide whether under all of those conditions that area was reasonably fit for the plaintiff to perform his work in the task assigned to him with reasonable safety."

If any of the grounds on which a case is submitted to a jury are found inadequate as a matter of law, the judgment must necessarily be reversed since

> "there is no way to know that the invalid claim of unseaworthiness was not the sole basis for the verdict."

United N. Y. & N. J. S. H. Pilots Asso. v. *Halecki*, 358 U. S. 613, at p. 619.

The basic concept of unseaworthiness as set forth in *The Osceola*, 189 U. S. 158 and *Seas Shipping Co.* v. *Sieracki*, 328 U. S. 85, and reiterated in *Gutierrez* v. *Waterman SS Corp.*, 373 U. S. 206, has not changed, although decisions currently being rendered including the instant one, indicate that it has.

We find the Fourth Circuit saying in *Scott* v. *Isbrandtsen Company* (CA 4), 327 F. 2d 113 at 124:

> "The obvious trend of the Supreme Court decisions is toward providing ever increasing protection for crewmen, longshoremen and even others employed by independent contractors who may be called upon to work aboard vessels."

Ferrante v. *Swedish American Lines*, (CA3) 331 F. 2d 571 at 578; and *Deffes* v. *Federal Barge Lines, Inc.*, (CA5) 361 F. 2d 422 at 425 are to like effect. These cases draw no distinction between broadening the area to which the unseaworthiness doctrine applies and changing the basic rule as to what constitutes unseaworthiness. They suggest that both have been or soon will be accomplished. The instant case clearly works a change in the basic rule as to what constitutes unseaworthiness and thus emphasizes the need for clarification of the rule.

IV

Weyerhaeuser SS Co. v. *Nacirema Operating Co.*, 355 U. S. 563 at 567, provides that if a stevedore renders a substandard performance "which led to foreseeable liability" of the shipowner, the stevedore may be cast in liability for indemnity. Thus legal liability of the shipowner would seem to be a necessary prerequisite to his

obtaining indemnity. To grant a shipowner indemnity without first establishing his legal liability, would seem to make the indemnitor an insurer and not to be in accord with *Weyerhaeuser SS Co.* v. *Nacirema Corp.* The Second Circuit however has dispensed with legal liability as a necessary prerequisite to indemnity in

> *Massa* v. *C. A. Venezuelan Navigation and John W. McGrath Corp.*, 332 F. 2d 779 at 782;
> *Paliaga* v. *Luckenbach S.S. Co.*, 301 F. 2d 403.

Whether these cases are distinguishable and whether they are decided correctly, there remains the unanswered question as to whether indemnity can be bottomed on a judgment against a shipowner which stems from an erroneous charge as to unseaworthiness.

CONCLUSION

Reason and the cases cited above, unequivocally support petitioner's contention that compelling need exists for this learned court to define the law as to judgments n.o.v. and Rule 50 F.R.C.P. for the guidance of all in the conduct of future civil jury trials and as to unseaworthiness and indemnity in the interest of uniformity and justice.

Dated: New York, N. Y., August 23, 1966.

Respectfully submitted,

EDMUND F. LAMB,
Attorney for Petitioner.

VINCENT A. CATOGGIO,
On Petition.

APPENDIX

A.

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 386—September Term, 1965.

(Argued May 25, 1966 Decided June 16, 1966.)

Docket No. 30372

SAMUEL MOSLEY,

Plaintiff-Appellee,

—v.—

CIA. MAR. ADRA S.A.,

Defendant-Appellant and Third-Party Plaintiff-Appellee,

—v.—

LIPSETT STEEL PRODUCTS, INC.,

Third-Party Defendant-Appellant.

Before:

FRIENDLY, HAYS and FEINBERG,

Circuit Judges.

Appeal from a judgment of the United States District Court for the Southern District of New York, Lloyd F. MacMahon, *Judge,* based upon the verdict of a jury awarding damages to plaintiff for injury resulting from a breach of the shipowner's warranty of seawothiness, and from a

judgment notwithstanding the verdict in favor of the shipowner against the third-party defendant, plaintiff's employer, on the issue of indemnity.

Affirmed.

GEORGE J. ENGELMAN, New York, N. Y. (Gay & Behrens, New York, N. Y., of counsel), *for Plaintiff, Mosley.*

VICTOR S. CICHANOWICZ, New York, N. Y. (William P. Larsen, and Cichanowicz & Callan, New York, N. Y., of counsel), *for Defendant, Cia. Mar. Adra S.A.*

VINCENT A. CATOGGIO, New York, N. Y. (Purdy, Lamb & Catoggio, New York, N. Y., on the brief), *for Third-Party Defendant, Lipsett Steel Products, Inc.*

HAYS, *Circuit Judge:*

Plaintiff Mosley, a longshoreman in the employ of a stevedore company, Lipsett Steel Products, Inc., the third-party defendant, was injured while loading scrap metal on the *S.S. Turmoil,* a vessel owned and operated by Cia. Mar. Adra S.A., the defendant. This is an appeal by the shipowner from a judgment of $125,000 entered in the United States District Court for the Southern District of New York, in favor of Mosley for injury resulting from a breach of the shipowner's warranty of seaworthiness. The stevedore company appeals from a judgment notwithstanding the verdict in favor of the shipowner, on the issue of indemnity. We affirm on both appeals.

This case is before us for a second time, having been reversed and remanded for a new trial on a previous ap-

peal because it was impossible to ascertain whether the general verdict for plaintiff was based on a permissible ground, a finding that there was insufficient lighting, or on an impermissible ground, the use of a hook which was not shown to be an appurtenance of the ship or unfit for its intended use. See *Mosley* v. *Cia. Mar. Adra, S.A.*, 314 F. 2d 223 (2d Cir.), cert. denied, 375 U. S. 829 (1963).

I.

There is evidence in the record to support the conclusion that the injury to Mosley occurred in the following way.

On October 8, 1956 the *S.S. Turmoil* began loading a cargo of scrap metal at the Port of Newark. Mosley was part of a gang assigned to load scrap into the 'tween deck of the #5 hatch. Mosley's job was to direct the placing of metal scrap which a crane dumped down a chute. When one part of the 'tween deck became filled, he would direct the chute toward another area in order to assure an even distribution of the cargo. The chute, forty feet long and three to five feet wide at top, tapering to the bottom, was suspended in the hatch from the cargo runners of the ship by means of bridles and shackles.

At the close of the workday on October 14, the day before the accident, a load of scrap metal had been placed in the square of the hatch of the 'tween deck to a height of three-and-a-half or four feet, partially blocking the entry of natural light.

The next morning, after Mosley had been at work about an hour and a half, "a piece of transmission or the rear end of a car" became lodged in the tapered end of the chute, about three feet from the mouth and blocked the flow of scrap.

A.

Mosley, who was working alone on the 'tween deck, told the foreman to suspend the loading. He approached to within four or five feet of the chute, intending to use an "improvised hook" five or six feet in length, to dislodge the metal. He positioned himself "as best as I possibly could" on a deck littered with irregular pieces of scrap. While he was attempting to remove the obstruction, the scrap under Mosley's feet gave way; he fell and was injured.

The trial judge charged the jury:

> "Specifically here the question which you have to decide is whether under all the circumstances the tween deck area was reasonably fit to permit the plaintiff to perform his work with reasonable safety. And here you have to take into consideration all of the conditions then obtaining, the type of operation that was going on, the lighting conditions, the chute, the kind of chute it was, the condition of the deck.
>
> • • • • • •
>
> But consider all the conditions and decide whether under all of those conditions that area was reasonably fit for the plaintiff to perform his work in the task assigned to him with reasonable safety."

The defendant shipowner argues that this charge permitted the jury to consider "grounds which were not established by the evidence." But the evidence on each point mentioned in the charge need not be weighed separately. Mosley's contention, and the theory on which the case was submitted to the jury, was that the various factors mentioned each contributed to the unseaworthiness of the 'tween deck area, i.e., rendered it unsuitable for the use to which it was put.

A.

In *Krey* v. *United States*, 123 F. 2d 1008, 1010 (2d Cir. 1941) this court, referring to a number of separate factors which, it was charged, resulted in the unseaworthiness of an area of the ship, held that:

> "*these factors combined* seem to us clearly to establsih an unseaworthy condition." (Emphasis added.)

Here, the chute was specifically put in place to receive the cargo of metal scrap. It was an appurtenance of the ship. Plaintiff presented evidence that because of the tapered nature of the chute, and the diverse sizes and shapes of the metal scrap, obstructions were bound to occur. "The vessel's duty to furnish seamen with tools reasonably fit for their intended use is absolute." *Michalic* v. *Cleveland Tankers, Inc.*, 364 U. S. 325, 327 (1960).

The 'tween deck was littered with irregular pieces of metal scrap. The chief officer of the *S.S. Turmoil* testified that he refused to enter the 'tween deck area during loading because it was "dangerous"; scrap would "fall off" the chute; it "bounces" and "ricochets around." This situation when combined with lack of adequate lighting resulted in unseaworthiness. See *Ross* v. *S.S. Zeeland*, 240 F. 2d 820, 822-23 (4th Cir. 1957). There was more than enough evidence to support a finding that there was insufficient lighting in the 'tween deck area. See *Mosley* v. *Cia. Mar. Adra, S.A.*, 314 F. 2d 223, 227-28 (2d Cir.), cert. denied, 375 U. S. 829 (1963).

Defendant contends that portable lighting equipment was available to the longshoremen on request. There is testimony that such equipment was in the storehouse of the ship, but there is no showing that it was available for this area on the date in question. Nor was evidence produced concerning the adequacy and condition of electrical

outlets. Indeed, Foreman Brown, who was in charge of loading, testified that his general request for lighting equipment was not acted upon.

In *Mahnich* v. *Southern S.S. Co.*, 321 U.S. 96, 103-04 (1944) the Supreme Court said:

> "Nor does the fact that there was sound rope on board, which might have been used to rig a safe staging, afford an excuse to the owner for the failure to provide a safe one . . . the owner must provide the seaman with seaworthy appliances with which to do his work, . . . *safe appliances* [*must*] *be furnished when and where the work is to be done.*" (Emphasis added.)

Unseaworthiness is not "excused because proper equipment was available but went unused." *Skibinski* v. *Waterman S.S. Corp.*, —— F. 2d ——. (2d Cir. March 31, 1966).

"[T]he owner warrants to longshoremen . . . a safe place in which to handle cargo." *Carabellese* v. *Naviera Asnar, S.A.*, 285 F. 2d 355, 359-60 (2d Cir. 1960), cert. denied, 365 U. S. 872 (1951). There was ample evidence to support the jury's finding that the place where Mosley was assigned to work was unsafe.

Defendant also argues that the district court "submitted the case to the jury on issues other than those defined and limited by the pre-trial order." The pre-trial order simply indicated that "all the issues of fact and law to be raised at the second trial of this action have previously been raised at the first."

Mosley's proof involved substantially the same factors on both trials. To the extent that there was any variation, the district court properly modified the pre-trial order pursuant to Rule 14, of the Calendar Rules of the United States District Court for the Southern District of New York.

A.

There is nothing in the charge of the district court concerning the hook used by Mosley that conflicts with this court's opinion in *Mosley* v. *Cia. Mar. Adra, S.A., supra.*

II.

The jury returned a verdict in favor of the stevedore company, in the third party action brought by the shipowner for indemnity. The district court set aside the verdict and granted judgment n.o.v. to the shipowner.

The stevedore company claims that Cia. Mar. Adra did not move for a directed verdict on the third party complaint and therefore could not properly make an n.o.v. motion. See 5 Moore, *Federal Practice* ¶50.08 (2d ed. 1964).

At the conclusion of all the evidence, Lipsett Steel sought dismissal of the third party complaint:

> "on the ground that there is no proof that the third-party defendant failed to perform its contract properly. * * *"

Cia. Mar. Adra's counsel stated:

> "Your Honor, the defendant renews its motion to dismiss the complaint and for a directed verdict on the ground that the evidence *is insufficient on which to go to the jury on any of these issues that have been raised in this case.*" (Emphasis added.)

This motion, although somewhat ambiguous, preserved Cia. Mar. Adra's right to make an n.o.v. motion.

The requirement of Rule 50(b) of the Federal Rules of Civil Procedure,* that a directed verdict motion must pre-

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* Rule 50(b) of the Federal Rules of Civil Procedure reads in relevant part:

"(b) MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT. Whenever a motion for a directed verdict made at the close of

cede an n.o.v. motion is harsh in any circumstances. Especially where, as here, three parties are involved, where the attention of the defendant's counsel is focused on the plaintiff, his primary adversary, and where there are the complications which must attend a trial of this type, a motion such as that made by counsel should not be read narrowly, so as to penalize the client but rather should be read in light of the purpose of the Federal Rules to "secure the just, speedy and inexpensive determination of every action."

Cia. Mar. Adra in a memorandum in support of its n.o.v. motion expressly pointed out to the district court that a motion for a directed verdict had been made. Lipsett Steel in its memorandum of opposition did not dispute this claim. The fact that Lipsett Steel did not take exception to the n.o.v. motion suggests that Cia. Mar. Adra's directed verdict motion was accepted as covering the indemnity issue.

On the merits of the n.o.v. motion, the trial judge ruled that "any seaworthy condition obtaining in the 'tween deck area was created by the stevedore . . ." A stevedore company is liable for indemnity if it creates an unseaworthy condition, or if it fails to eliminate a known risk created by another. See *Mortensen* v. *A/S Glittre*, 348 F. 2d 383, 385 (2d Cir. 1965). Since Lipsett furnished and rigged

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all the evidence is denied or for any reason is not granted, the court is deemed to have submitted the action to the jury subject to a later determination of the legal questions raised by the motion. Not later than 10 days after entry of judgment, a party who has moved for a directed verdict may move to have the verdict and any judgment entered thereon set aside and to have judgment entered in accordance with his motion for a directed verdict; or if a verdict was not returned such party, within 10 days after the jury has been discharged, may move for judgment in accordance with his motion for a directed verdict."

the chute, and controlled all other relevant aspects of the loading, the jury would have to find that the stevedore company was liable for a breach of its warranty of workmanlike service. See, e.g., *Italia Societa* v. *Oregon Stevedoring Co.*, 376 U. S. 315, 318-24 (1964); *Crumady* v. *The J. H. Fisser*, 358 U. S. 423, 428-29 (1950); *Ryan Stevedoring Co.* v. *Pan-Atlantic S.S. Corp.*, 350 U. S. 124, 133-34 (1956).

Affirmed.

FRIENDLY, *Circuit Judge* (dissenting):

Deeply regretting the necessity, I see no alternative to sending this case back for a third trial in which, hopefully, the jury may be given a proper charge. Despite views last expressed in *Skibinski* v. *Waterman S.S. Corp.*, —— F. 2d ——, —— (1966) (dissenting opinion), slip opinions 1397, 1404, I agree that Mosley was entitled to go to the jury on the issue of inadequate lighting; although the cases generally cited to this point concerned failure to supply lighting at night, *Mollica* v. *Compania Sud-Americana de Vapores*, 202 F. 8d 25, 27 (2 Cir.), cert. denied, 345 U. S. 965 (1953); *Ross* v. *S.S. Zeeland*, 240 F. 2d 820, 822-23 (4 Cir. 1957), the jury could properly have found that the stevedores had created on October 14 a condition of permanent night in the 'tween deck of the #5 hatch. Cf. *Robillard* v. *A. L. Burbank & Co.*, 186 F. Supp. 193 (S. D. N. Y. 1960). Whether the form of the chute afforded any basis for a finding of unseaworthiness is decidedly questionable; we have been pointed to no evidence that its configuration departed from the norm, and the tapering must have served a useful purpose in decelerating the falling scrap. However, the jury was permitted to find unseaworthiness not only on these accounts but on the basis of "the type of operation that was going on" and "the

condition of the deck"—activities and results being currently created by Mosley's employer, Lipsett, in the work it was hired to perform. Metal scrap can hardly be loaded so as to leave a 'tween deck entirely spick and span; if Lipsett exceeded permissible limits of messiness, this went to its negligence but not to the seaworthiness of the ship. Cf. *Morales* v. *City of Galveston*, 370 U. S. 165 (1962). In granting the ship's motion for judgment n.o.v. against Lipsett, the judge recognized that the absence of lighting might be "the only unseaworthiness," yet his instruction permitted the jury to find against the ship not only on that permissible ground but on impermissible ones. The same rule of law applied in our prior decision requires a new trial.

B.

MEMORANDUM

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

Civ. No. 127-204

SAMUEL MOSLEY,

Plaintiff,

against

CIA. MAR. ADRA S.A.,

Defendant and
Third-Party Plaintiff,

against

LIPSETT STEEL PRODUCTS, INC.,

Third-Party Defendant.

MACMAHON, *District Judge.*

Plaintiff, a longshoreman employed by third-party defendant, was injured while loading scrap metal in a tween deck area of defendant's vessel. The jury, on a theory of unseaworthiness, returned a verdict in favor of plaintiff, but refused to award indemnity to the ship in its action over against the stevedore. Defendant now moves under Rule 50(b) of the Federal Rules of Civil Procedure for judgments n.o.v. against both plaintiff and third-party defendant, or, alternatively, for new trials. With regard to the main action, it contends that the vessel was seaworthy as a matter of law and that the award of $125,000.00 was

unreasonably excessive; and with regard to the suit for indemnity, that the stevedore was liable over to it as a matter of law.

Taking these contentions one at a time, we have no doubt that the issue of seaworthiness was properly submitted to the jury and that the jury could reasonably have found that the tween deck area was not a reasonably safe place for plaintiff to perform his assigned task of removing obstructions from the chute in order to continue stowing the scrap cargo as directed. The jury could find from uncontradicted evidence that, on the occasion in question, plaintiff approached the chute over a deck littered with scrap, tried to secure an adequate footing but due to darkness could not see whether the scrap on which he was standing was firm or loose, reached upward and forward with an improvised hook, started to pull on a piece of scrap lodged in the narrow end of a tapered chute, and fell backwards when his footing gave way. We think the jury could reasonably have found that the lighting was so poor as to constitute an unseaworthy condition and the proximate cause of plaintiff's injuries. There was ample evidence that the daylight was all but blocked out of the hold by intense dust, the large intruding chute, the overhead magnet, and the high pile of scrap pyramided almost to the bottom of the coaming which framed the square of the hatch. Artificial lighting was available but not provided. The jury could also have reasonably found that the chute was tapered too narrw at the bottom for the size of some of the pieces of scrap and therefore unfit for its intended purpose; that the deck was so cluttered that it was a hazardous floor for the task assigned to plaintiff; that the primary method of clearing the chute was itself unsafe; or that any of these factors—the darkness, the chute, the size of the lodged piece of scrap, the littered deck, the

method of clearing the chute—operated in combination, *Kray* v. *United States*, 123 F. 2d 1008, 1010 (2d Cir. 1941), to create an unseaworthy condition.

Nor is the verdict excessive as a matter of law. There was evidence adduced that at the time of his injury plaintiff was earning between six and seven thousand dollars a year; that he could reasonably have expected to continue working as a longshoreman for nineteen years, with wage rates on the rise; and that as a result of his injury he is permanently disabled from performing the kind of heavy labor by which he has always earned his living. There was further evidence that his education is slight. This, combined with the fact that plaintiff is a Negro, substantially reduces his opportunity to mitigate damages in the fields left open to him. In addition, there was voluminous evidence of pain and suffering, past, present, and future. Plaintiff appeared to have unfeigned difficulty walking to and from the stand, a fact which the jury could surely consider. In short, while the award is high, it cannot be said to be unreasonably excessive.

Defendent's third contention is that it is entitled to indemnity as a matter of law. With this contention, we wholly agree. The law is clear that a stevedore is liable over if he himself created the unseaworthy condition, or if the performance of a workmanlike job called for the elimination of a known risk created by another. *Mortensen* v. *A/B Glittre*, 348 F. 2d 383, 385 (2d Cir. 1965); *Albanese* v. *M. V. Nedorl, Amerik Stoomv, Maata.*, 346 F. 2d 481, 484 (2d Cir.), *rev'd on other grounds*, 34 U.S.L. Week 3217 (Dec. 13, 1965). Here, there is no question but that any unseaworthy condition obtaining in the tween deck area was created by the stevedore and that the verdict in its favor is against the weight of the evidence. Even if we assume that the absence of lighting was the only unsea-

worthiness and that this condition was in its inception wholly attributable to the owner's failure to provide internal lights, the stevedore could and should have corrected it. There was uncontradicted evidence that electrical outlets were installed in the hold where plaintiff was working and that, in another hold on an earlier day, the stevedore had made use of such an outlet to provide artificial illumination. In this regard, plaintiff's knowledge of inadequate lighting is imputable to his employer, third-party defendant. *Mortensen* v. *A/B Glittre, supra* at 385.

Accordingly, defendant's motion for judgment n.o.v. against plaintiff is denied, and the Clerk is directed to enter judgment for plaintiff in accordance with the jury's verdict. Defendant's motion for judgment n.o.v. against third-party defendant is, however, granted, and the Clerk is directed to enter judgment for defendant against third-party defendant. The jury's verdict for third-party defendant is hereby set aside. Defendant's alternative motions for new trials are in all respects denied.

So ordered.

Dated: New York, N. Y.
January 27, 1966

LLOYD F. MACMAHON
United States District Judge

C.

UNITED STATES COURT OF APPEALS

FOR THE

SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the sixteenth day of June one thousand nine hundred and sixty-six.

Present:

HON. HENRY J. FRIENDLY,
HON. PAUL R. HAYS,
HON. WILFRED FEINBERG,

Circuit Judges.

SAMUEL MOSLEY,

Plaintiff-Appellee,

v.

CIA. MAR. ADRA S.A.,

Defendant and Third-Party Plaintiff-Appellant-Appellee,

LIPSETT STEEL PRODUCTS, INC.,

Third-Party Defendant-Appellant.

Appeal from the United States District Court for the Southern District of New York.

C.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered adjudged, and decreed that the judgment of said District Court be and it hereby is affirmed with costs to the plaintiff-appellee, Samuel Mosley, and to third party plaintiff-appellee Cia. Mar. Adra S.A.

Daniel

A. [redacted] FUSARO
Clerk

D.

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

SAMUEL MOSLEY,

Plaintiff,

v.

CIA. MAR. ADRA S.A.,

Defendant and Third-Party Plaintiff-Appellee,

v.

LIPSETT STEEL PRODUCTS, INC.,

Third-Party Defendant-Appellant.

PETITION FOR REHEARING

Purdy, Lamb & Catoggio, New York, N. Y., for third-party defendant-appellant.

Petition for rehearing by the panel denied.

H. J. F.
P. R. H.
W. F.
U.S.C.JJ.

Jul 22 1966

E.

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

SAMUEL MOSLEY,

Plaintiff,

v.

CIA. MAR. ADRA S.A.,

Defendant and Third-Party Plaintiff-Appellee,

v.

LIPSETT STEEL PRODUCTS, INC.,

Third-Party Defendant-Appellant.

PETITION FOR REHEARING IN BANC

Purdy, Lamb & Catoggio, New York, N. Y., for third-party defendant-appellant.

No active circuit judge having requested that the case be reheard in banc, the petition is denied.

J. EDWARD LUMBARD,
Chief Judge

22 July 1966

SUPREME COURT, U. S.

FILED
SEP 13 1966
JOHN F. DAVIS, CLERK

Supreme Court of the United States

OCTOBER TERM, 1966

No. 550

CIA. MAR. ADRA S.A.,
Petitioner,

—against—

SAMUEL MOSLEY,
Respondent,

—against—

LIPSETT STEEL PRODUCTS, INC.,
Respondent.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT ON BEHALF OF CIA. MAR. ADRA S.A.

VICTOR S. CICHANOWICZ
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VICTOR S. CICHANOWICZ
and
WILLIAM P. LARSEN
On Petition

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Supreme Court of the United States

OCTOBER TERM, 1966

No.

CIA. MAR. ADRA S.A.,

Petitioner,

—against—

SAMUEL MOSLEY,

Respondent,

—against—

LIPSETT STEEL PRODUCTS, INC.,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner, Cia. Mar. Adra S.A. prays that a writ of certiorari issue to review the decision and judgment of the United States Court of Appeals for the Second Circuit entered June 11, 1966 insofar as it affirmed the judgment which was entered in the United States District Court for the Southern District of New York in favor of the respondent-longshoreman, Samuel Mosley against petitioner in the amount of $125,000.00 as damages for personal injuries.

This petition, however, is prayed for only in the event this Court should grant the petition for a writ of certiorari filed by respondent, Lipsett Steel Products, Inc. in No. 498 at this term. If the petition

in No. 498 is denied, Cia. Mar. Adra does not ask that the present petition be granted.

Citations to the Opinions Below

The memorandum opinion of the District Court is unreported and is printed in Appendix A, hereto infra, p. 13. The majority opinion and dissenting opinion of the United States Court of Appeals, printed in Appendix B hereto, infra, p. 17 is reported at 362 F.2d 118.

Judgments entered after a prior trial of this same matter were reversed because of substantially the same errors as are here claimed on the charge to the jury on the respondent-longshoreman's case against the petitioner and the case in its entirety was remanded for a new trial by the Court of Appeals. That opinion of the Court of Appeals appears at 314 F.2d 223. This Court denied certiorari at 375 U.S. 829.

Jurisdiction

The judgment of the Court of Appeals was entered on June 16, 1966, printed in Appendix C hereto, infra, p. 28. The petition for rehearing by respondent, Lipsett Steel Products, Inc. from the award of indemnity was denied on July 22, 1966. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1) and Rule 19(b) of this Court.

Questions Presented

1. Whether in a case which is predicated solely on breach of warranty of seaworthiness, the claim based on negligence having been dismissed for failure to establish negligence, is it nevertheless proper to charge the negligence concept of "safe place to work" and equate it with "fitness for intended use"?

2. Whether a charge is correct which instructs a jury that it may find unseaworthiness by taking into account all the circumstances, all the conditions then obtaining, without regard to whether it has been established that at least some of the conditions rendered the vessel unfit for its intended use or purpose?

Statement

This case arises out of an accident which was sustained by a longshoreman in the course of a loading operation being conducted by his employer, respondent, Lipsett Steel Products, Inc. aboard petitioner's vessel. The cargo being loaded at the time was loose scrap metal of varying sizes and shapes. It was dumped into a semi-circular steel chute which was suspended on an incline from the main deck into the hatch opening. The scrap was caused by gravity to slide down and off the bottom end of the chute into the hatch storage areas.

The accident in question occurred some two hours after loading had commenced. Up to about the time of the accident the work had proceeded without in-

cident. The plaintiff-longshoreman, whose duty it was to see to it that the scrap was loaded properly; to remove any scrap which might become lodged in the chute and to assist in changing the chute when a particular area became filled, stayed in the tween deck of the hatch where his gang was loading the loose scrap metal. Except for the time shortly before the accident when the chute was moved because the area into which the chute had pointed became filled, plaintiff stood on the deck out of the way of the falling scrap metal.

Shortly before the accident, plaintiff noticed that a piece of scrap metal, which he was not otherwise able to identify from the position where he was standing, became lodged in the chute several feet from its lower end. Before proceeding to investigate, plaintiff made certain that the loading had stopped and he then picked up a piece of scrap metal which some other longshoreman had improvised into a hook and proceeded toward the chute where the scrap was lodged. In order to reach the chute, it was necessary for the plaintiff to step on scrap metal which had fallen onto the deck in the vicinity of the chute. Without hesitation, plaintiff walked over this scrap and on reaching the chute noticed that the scrap which was creating the problem was what appeared to be the rear end of an automobile. Although the plaintiff was mindful of the fact that he was standing on scrap metal of varying sizes and shapes; that his footing was insecure, and that the chute was at such a height that he had to elevate his hands to eye level in order to pull on the improvised hook, plaintiff attached the hook to the rear end of the automobile and exerting all his

strength and weight tried to pull the lodged piece of scrap metal over the side of the chute. The inevitable happened. The rear end of the automobile would not dislodge but instead the scrap underfoot moved and plaintiff fell backwards.

Plaintiff sued petitioner-shipowner claiming that his accident was caused by the unseaworthiness of petitioner's vessel and the negligence of petitioner. Petitioner impleaded plaintiff's employer, respondent, Lipsett Steel Products, Inc., claiming indemnity for breach of warranty of workmanlike service.

Following the first trial, a jury awarded plaintiff recovery against petitioner and awarded petitioner indemnity against Lipsett Steel Products, Inc., the employer.

On appeal to the Court of Appeals, the jury verdict in plaintiff's favor was set aside for errors in the charge and the case remanded for a new trial on all issues. (314 F.2d 223) Certiorari was denied. (375 U.S. 829) On the first trial, the Court had charged the jury that it could find the vessel unseaworthy on several alternate grounds even though there was no proof that some of the grounds constituted unfitness for intended use. Because of the possibility that the jury may have based its finding on an unproven ground and since it was not possible to tell from the general verdict on which ground the jury's finding was based the case was remanded for a new trial.

On retrial, despite the admonition of the Court of Appeals, the Trial Court again not only instructed the jury that it could find unseaworthiness on the

basis of the unproven grounds previously held to constitute reversible error, but added new ones.

The Trial Court charged the jury in part:

> "Specifically here the question which you have to decide is whether under all the circumstances the tween deck area was reasonably fit to permit the plaintiff to perform his work with reasonable safety. And here you have to take into consideration all of the conditions then obtaining, the type of operation that was going on, the lighting conditions, the chute, the kind of chute it was, the condition of the deck."

The charge respecting the hook is particularly noteworthy. It said:

> "And I say to you now that there is no evidence in this case from which you could find that there is any defect in the hook. So take that out of your thinking on this except in the sense that the procedures were, * * * that the scrap would stick in the chute from time to time during these operations, and the first thing that was done to try to free the chute was for the plaintiff, or one working down there in the hold, as he was, to go over and yank that scrap out of there with his hook, and if that failed, then they lower the chute, or do something else to clear the chute." (R360-361)

On Appeal, the Court of Appeals, in a two to one decision, affirmed. Under its decision, no longer need there be a complete divorcement of unseaworthiness from concepts of negligence. Nor under the decision

is it necessary to establish that the vessel or its appliances or equipment were not reasonably fit for their intended use or purpose. Seaworthiness can be found even though none of the grounds on which it is predicated are either proven or constitute unfitness for intended use. In affirming the Court said:

> "The defendant shipowner argues that this charge permitted the jury to consider 'grounds which were not established by the evidence.' But the evidence on each point mentioned in the charge need not be weighed separately. Mosley's contention, and the theory on which the case was submitted to the jury, was that the various factors mentioned each contributed to the unseaworthiness of the 'tween deck area, i.e., rendered it unsuitable for the use to which it was put."

A litigant under this decision now has a choice. If he can establish unfitness for intended use he may proceed to prove it. If he does not desire to do so or is unable to establish unfitness all he need do is lump everything together and ask the jury to conclude from the fact of his injury that the place of work was unsafe.

Reasons for Granting the Writ

1. The decision of the Court below in the instant case is in conflict not only with its own prior decision in this case but with the principles laid down in cases such as *Kent* v. *Shell Oil Company,* 5 Cir., 1961, 286 F.2d 746; *Freitas* v. *Pacific Atlantic Steamship Company,* 9 Cir., 1955, 218 F.2d 562.

In *Kent* v. *Shell Oil Company,* 286 F.2d 746 the Court said at page 752:

> "* * *. Unseaworthiness to be sure sets in train awesome obligations which distinguish it from negligence. Michalic v. Cleveland Tankers, 1960, 364 U.S. 325, 81 S. ct 5, 5 LEd 2d 20, Cox v. Esso Shipping Co., 5 Cir., 1957, 247 F2d 629, 1957 AMC 1927. But neither under negligence principles nor the unseaworthiness doctrine does mere injury give rise to a claim. There must be evidence that within the classic definition of seaworthiness the gear being used is not reasonably fit for its intended use. * * *"

As the Court correctly pointed out in *Cox* v. *Esso Shipping Company,* 247 F.2d 629, 637, the standard by which negligence is to be measured and that by which seaworthiness is to be tested are clearly different and must be clearly distinguished otherwise the jury will get the impression that both concepts are to be tested by one gauge.

In its first decision (314 F.2d 223) in this case the Court of Appeals said at pages 228-229:

> "It is true that a shipowner can be held liable for failure to meet this duty to provide a seaworthy ship because an appurtenant appliance brought on board by the stevedore is not reasonably fit for its intended use * * *. But the existence of this principle of law does not relieve the plaintiff of his burden of demonstrating by a preponderance of the credible evidence that the appliance or tool which he claims caused his injury * * * was not reasonably fit for its intended use. * * *."

> "* * *. But as we have many times said, the mere fact that an acccident occurs and a seaman is injured while using an appurtenance in the performance of his duties cannot, without more, establish that a vessel is unseaworthy. * * *."

The Court in its prevailing opinion did not disagree that each of the grounds was not established. It dismissed the contention by stating:

> "* * *. But the evidence on each point mentioned need not be weighed separately. Mosley's contention, and the theoory on which the case was submitted to the jury, was that the various factors mentioned each contributed to the unseaworthiness of the 'tween deck area, i.e., rendered it unsuitable for the use to which it was put."

However, as Judge Friendly points out in his dissenting opinion, the problem was not that simple. He stated:

> "* * *. Whether the form of the chute afforded any basis for a finding of unseaworthiness is decidedly questionable; we have been pointed to no evidence that its configuration departed from the norm, and the tapering must have served a useful purpose in decelerating the falling scrap. However, the jury was permitted to find unseaworthiness not only on these accounts but on the basis of 'the type of operation that was going on' and 'the condition of the deck'—activities and results being currently created by Mosley's employer, Lipsett, in the work it was hired to perform. Metal scrap can hardly be loaded so as to leave a 'tween deck entirely spick and span; if

> Lipsett exceeded permissible limits of messiness, this went to its negligence but not to the seaworthiness of the ship. Cf. Morales v. City of Galveston, 370 U.S. 165 (1962). In granting the ship's motion for judgment n.o.v. against Lipsett, the judge recognized that the absence of lighting might be 'the only unseaworthiness,' yet his instruction permitted the jury to find against the ship not only on that permissible ground but on impermissible ones. The same rule of law applied in our prior decision requires a new trial."

The "Turmoil" was a cargo vessel in the process of being loaded with scrap metal. She did not cease to be "reasonably fit for her intended service" *Mitchell* v. *Trawler Racer, Inc.,* (1960), 362 U.S. 539, 550 simply because the scrap metal was on the deck where it was supposed to be loaded. The facts here bear no resemblance to the conditions of disarray in *DeGioia* v. *United States Lines Company,* 304 F.2d 421, 423, 2 Cir., 1961.

2. Clearly, the questions presented are of importance because of the large bulk of litigation in the Courts throughout the nation which involve not only longshoremen and seamen, but shoreworkers aboard ships as well.

Settlement of the question of what constitutes unseaworthiness and what is the burden which must be met in order to satisfy the requirements of this concept of liability would be in the public interest. While it seems that this Court was quite explicit in *Mitchell* v. *Trawler Racer, Inc.*, 362 U.S. 539 in holding that while there should be a complete divorcement of un-

seaworthiness liability from concepts of negligence and that this did not obligate the owner to provide an accident proof ship, the Courts appear to be construing *Mitchell* as a license to broaden and increase the shipowner's liability.

3. The decision of the Court below is believed to be erroneous as it is not only in conflict with cases such as *Kent* v. *Shell Oil Company,* 5 Cir., 1961, 286 F.2d 746 but with applicable decisions of this Court. In *Mitchell* v. *Trawler Racer, Inc.*, 362 U.S. 539, 550 this Court said:

> "What has been said is not to suggest that the owner is obligated to furnish an accident free ship. The duty is absolute, but it is a duty only to furnish a vessel and appurtenances reasonably fit for their intended use. The standard is not perfection, but reasonable fitness; not a ship that will weather every conceivable storm or withstand every imaginable peril of the sea, but a vessel reasonably suitable for her intended service. Boudoin v. Lykes Bros. S.S. Co. 348 U.S. 336, 99 L. ed. 354, 75 S. Ct. 382."

The reference to the *Boudoin* case would not seem to be without purpose. While that case involved liability arising from the assault of one crewmember upon another, it emphasized that not every crewmember renders the vessel unseaworthy merely because he becomes involved in a fight.

Such cases as *M.V. Tungus* v. *Skovgaard*, 1959, 358 U.S. 588, 594, *West* v. *United States*, 1959, 361 U.S. 118, 122-123, *Morales* v. *City of Galveston,* 370 U.S.

165, 170, 171 indicate that "safe place to work" is a negligence concept and has no place in the doctrine of seaworthiness.

Never has this Court, and, as far as research has been able to disclose, has any other court held that the issue of seaworthiness was to be determined by a jury's own concept of whether under "all the circumstances * * * all the conditions" the working area "was reasonably fit for the plaintiff to perform his work in the task assigned to him with reasonable safety". Under such an instruction it would hardly be possible to deny recovery even if the vessel was seaworthy.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted if the writ in #498 should be granted.

Respectfully submitted,

VICTOR CICHANOWICZ
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Cia Mar Adra, S.A.
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26 Broadway
New York, N.Y., 10004
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VICTOR S. CICHANOWICZ
and
WILLIAM P. LARSEN
On Petition

Appendix A

MEMORANDUM

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

Civ. No. 127-204

SAMUEL MOSLEY,

Plaintiff,

against

CIA. MAR. ADRA S.A.,

Defendant and
Third-Party Plaintiff,

against

LIPSETT STEEL PRODUCTS, INC.,

Third-Party Defendant.

MACMAHON, *District Judge.*

Plaintiff, a longshoreman employed by third-party defendant, was injured while loading scrap metal in a tween deck area of defendant's vessel. The jury, on a theory of unseaworthiness, returned a verdict in favor of plaintiff, but refused to award indemnity to the ship in its action over against the stevedore. Defendant now moves under Rule 50(b) of the Federal Rules of Civil Procedure for judgments n.o.v. against both plaintiff and third-party defendant, or, alternatively, for new trials. With regard to the main action, it contends that the vessel was seaworthy as a matter of law and that the award of $125,000.00 was unreasonably

excessive; and with regard to the suit for indemnity, that the stevedore was liable over to it as a matter of law.

Taking these contentions one at a time, we have no doubt that the issue of seaworthiness was properly submitted to the jury and that the jury could reasonably have found that the tween deck area was not a reasonably safe place for plaintiff to perform his assigned task of removing obstructions from the chute in order to continue stowing the scrap cargo as directed. The jury could find from uncontradicted evidence that, on the occasion in question, plaintiff approached the chute over a deck littered with scrap, tried to secure an adequate footing but due to darkness could not see whether the scrap on which he was standing was firm or loose, reached upward and forward with an improvised hook, started to pull on a piece of scrap lodged in the narrow end of a tapered chute, and fell backwards when his footing gave way. We think the jury could reasonably have found that the lighting was so poor as to constitute an unseaworthy condition and the proximate cause of plaintiff's injuries. There was ample evidence that the daylight was all but blocked out of the hold by intense dust, the large intruding chute, the overhead magnet, and the high pile of scrap pyramided almost to the bottom of the coaming which framed the square of the hatch. Artificial lighting was available but not provided. The jury could also have reasonably found that the chute was tapered too narrow at the bottom for the size of some of the pieces of scrap and therefore unfit for its intended purpose; that the deck was so cluttered that it was a hazardous floor for the task assigned to plain-

tiff; that the primary method of clearing the chute was itself unsafe; or that any of these factors—the darkness, the chute, the size of the lodged piece of scrap, the littered deck, the method of clearing the chute—operated in combination, *Kray* v. *United States,* 123 F. 2d 1008, 1010 (2d Cir. 1941), to create an unseaworthy condition.

Nor is the verdict excessive as a matter of law. There was evidence adduced that at the time of his injury plaintiff was earning between six and seven thousand dollars a year; that he could reasonably have expected to continue working as a longshoreman for nineteen years, with wage rates on the rise; and that as a result of his injury he is permanently disabled from performing the kind of heavy labor by which he has always earned his living. There was further evidence that his education is slight. This, combined with the fact that plaintiff is a Negro, substantially reduces his opportunity to mitigate damages in the fields left open to him. In addition, there was voluminous evidence of pain and suffering, past, present, and future. Plaintiff appeared to have unfeigned difficulty walking to and from the stand, a fact which the jury could surely consider. In short, while the award is high, it cannot be said to be unreasonably excessive.

Defendent's third contention is that it is entitled to indemnity as a matter of law. With this contention, we wholly agree. The law is clear that a stevedore is liable over if he himself created the unseaworthy condition, or if the performance of a workmanlike job called for the elimination of a known risk created by another. *Mortensen* v. *A/B Glittre,* 348 F.2d 383, 385 (2d Cir. 1965); *Albanese* v. *M. V. Nedorl, Amerik*

Stoomv, Maata., 346 F. 2d 481, 484 (2d Cir.), *rev'd on other grounds*, 34 U.S.L. Week 3217 (Dec. 13, 1965). Here, there is no question but that any unseaworthy condition obtaining in the tween deck area was created by the stevedore and that the verdict in its favor is against the weight of the evidence. Even if we assume that the absence of lighting was the only unseaworthiness and that this condition was in its inception wholly attributable to the owner's failure to provide internal lights, the stevedore could and should have corrected it. There was uncontradicted evidence that electrical outlets were installed in the hold where plaintiff was working and that, in another hold on an earlier day, the stevedore had made use of such an outlet to provide artificial illumination. In this regard, plaintiff's knowledge of inadequate lighting is imputable to his employer, third-party defendant. *Mortensen* v. *A/B Glittre, supra* at 385.

Accordingly, defendant's motion for judgment n.o.v. against plaintiff is denied, and the Clerk is directed to enter judgment for plaintiff in accordance with the jury's verdict. Defendant's motion for judgment n.o.v. against third-party defendant is, however, granted, and the Clerk is directed to enter judgment for defendant against third-party defendant. The jury's verdict for third-party defendant is hereby set aside. Defendant's alternative motions for new trials are in all respects denied.

So ordered.

Dated: New York, N.Y.
January 27, 1966

LLOYD F. MACMAHON
United States District Judge

Appendix B

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 386—September Term, 1965.

(Argued May 25, 1966 Decided June 16, 1966.)

Docket No. 30372

SAMUEL MOSLEY,

Plaintiff-Appellee,

—v.—

CIA MAR. ADRA S.A.,

Defendant-Appellant and
Third-Party Plaintiff-Appellee,

—v.—

LIPSETT STEEL PRODUCTS, INC.,

Third-Party Defendant-Appellant.

Before:

FRIENDLY, HAYS and FEINBERG,

Circuit Judges.

Appeal from a judgment of the United States District Court for the Southern District of New York, Lloyd F. MacMahon, *Judge,* based upon the verdict of a jury awarding damages to plaintiff for injury resulting from a breach of the shipowner's warranty of seaworthiness, and from a judgment notwithstanding the verdict in favor of the shipowner against the

third-party defendant, plaintiff's employer, on the issue of indemnity.

Affirmed.

GEORGE J. ENGELMAN, New York, N.Y. (Gay & Behrens, New York, N.Y., of counsel), *for Plaintiff, Mosley.*

VICTOR S. CICHANOWICZ, New York, N. Y. (William P. Larsen, and Cichanowicz & Callan, New York, N. Y., of counsel), *for Defendant, Cia. Mar. Adra S.A.*

VINCENT A. CATOGGIO, New York, N. Y. (Purdy, Lamb & Catoggio, New York, N.Y., on the brief), *for Third-Party Defendant, Lipsett Steel Products, Inc.*

HAYS, *Circuit Judge*:

Plaintiff Mosley, a longshoreman in the employ of a stevedore company, Lipsett Steel Products, Inc., the third-party defendant, was injured while loading scrap metal on the *S.S. Turmoil*, a vessel owned and operated by Cia. Mar. Adra S.A., the defendant. This is an appeal by the shipowner from a judgment of $125,000 entered in the United States District Court for the Southern District of New York, in favor of Mosley for injury resulting from a breach of the shipowner's warranty of seaworthiness. The stevedore company appeals from a judgment notwithstanding the verdict in favor of the shipowner, on the issue of indemnity. We affirm on both appeals.

This case is before us for a second time, having been reversed and remanded for a new trial on a previous

appeal because it was impossible to ascertain whether the general verdict for plaintiff was based on a permissible ground, a finding that there was insufficient lighting, or on an impermissible ground, the use of a hook which was not shown to be an appurtenance of the ship or unfit for its intended use. See *Mosley* v. *Cia. Mar. Adra, S.A.*, 314 F. 2d 223 (2d Cir.), cert denied, 375 U. S. 829 (1963).

I.

There is evidence in the record to support the conclusion that the injury to Mosley occurred in the following way.

On October 8, 1956 the *S.S. Turmoil* began loading a cargo of scrap metal at the Port of Newark. Mosley was part of a gang assigned to load scrap into the 'tween deck of the #5 hatch. Mosley's job was to direct the placing of metal scrap which a crane dumped down a chute. When one part of the 'tween deck became filled, he would direct the chute toward another area in order to assure an even distribution of the cargo. The chute, forty feet long and three to five feet wide at top, tapering to the bottom, was suspended in the hatch from the cargo runners of the ship by means of bridles and shackles.

At the close of the workday on October 14, the day before the accident, a load of scrap metal had been placed in the square of the hatch of the 'tween deck to a height of three-and-a-half or four feet, partially blocking the entry of natural light.

The next morning, after Mosley had been at work about an hour and a half, "a piece of transmission or

the rear end of a car" became lodged in the tapered end of the chute, about three feet from the mouth and blocked the flow of scrap.

Mosley, who was working alone on the 'tween deck, told the foreman to suspend the loading. He approached to within four or five feet of the chute, intending to use an "improvised hook" five or six feet in length, to dislodge the metal. He positioned himself "as best as I possibly could" on a deck littered with irregular pieces of scrap. While he was attempting to remove the obstruction, the scrap under Mosley's feet gave way; he fell and was injured.

The trial judge charged the jury:

> "Specifically here the question which you have to decide is whether under all the circumstances the tween deck area was reasonably fit to permit the plaintiff to perform his work with reasonable safety. And here you have to take into consideration all of the conditions then obtaining, the type of operation that was going on, the lighting conditions, the chute, the kind of chute it was, the condition of the deck.
>
> * * * *
>
> But consider all the conditions and decide whether under all of those conditions that area was reasonably fit for the plaintiff to perform his work in the task assigned to him with reasonable safety."

The defendant shipowner argues that this charge permitted the jury to consider "grounds which were

not established by the evidence." But the evidence on each point mentioned in the charge need not be weighed separately. Mosley's contention, and the theory on which the case was submitted to the jury, was that the various factors mentioned each contributed to the unseaworthiness of the 'tween deck area, i.e., rendered it unsuitable for the use to which it was put.

In *Krey* v. *United States,* 123 F. 2d 1008, 1010 (2d Cir. 1941) this court, referring to a number of separate factors which, it was charged, resulted in the unseaworthiness of an area of the ship, held that:

> "*these factors combined* seem to us clearly to establish an unseaworthy condition." (Emphasis added.)

Here, the chute was specifically put in place to receive the cargo of metal scrap. It was an appurtenance of the ship. Plaintiff presented evidence that because of the tapered nature of the chute, and the diverse sizes and shapes of the metal scrap, obstructions were bound to occur. "The vessel's duty to furnish seamen with tools reasonably fit for their intended use is absolute." *Michalic* v. *Cleveland Tankers, Inc.,* 364 U. S. 325, 327 (1960).

The 'tween deck was littered with irregular pieces of metal scrap. The chief officer of the *S.S. Turmoil* testified that he refused to enter the 'tween deck area during loading because it was "dangerous"; scrap would "fall off" the chute; it "bounces" and "ricochets around." This situation when combined with lack of adequate lighting resulted in unseaworthiness.

See *Ross* v. *S.S. Zeeland,* 240 F. 2d 820, 822-23 (4th Cir. 1957). There was more than enough evidence to support a finding that there was insufficient lighting in the 'tween deck area. See *Mosley* v. *Cia. Mar. Adra, S.A.,* 314 F. 2d 223, 227-28 (2d Cir.), cert. denied, 375 U. S. 829 (1963).

Defendant contends that portable lighting equipment was available to the longshoremen on request. There is testimony that such equipment was in the storehouse of the ship, but there is no showing that it was available for this area on the date in question. Nor was evidence produced concerning the adequacy and condition of electrical outlets. Indeed, Foreman Brown, who was in charge of loading, testified that his general request for lighting equipment was not acted upon.

In *Mahnich* v. *Southern S.S. Co.,* 321 U.S. 96, 103-04 (1944) the Supreme Court said:

> "Nor does the fact that there was sound rope on board, which might have been used to rig a safe staging, afford an excuse to the owner for the failure to provide a safe one . . . the owner must provide the seaman with seaworthy appliances with which to do his work, . . . *safe appliances* [*must*] *be furnished when and where the work is to be done.*" (Emphasis added.)

Unseaworthiness is not "excused because proper equipment was available but went unused." *Skibinski* v. *Waterman S.S. Corp.,* —— F.2d —— (2d Cir. March 31, 1966).

"[T]he owner warrants to longshoremen . . . a safe place in which to handle cargo." *Carabellese* v. *Na-*

viera Asnar, S.A., 285 F. 2d 355, 359-60 (2d Cir. 1960), cert. denied, 365 U.S. 872 (1951). There was ample evidence to support the jury's finding that the place where Mosley was assigned to work was unsafe.

Defendant also argues that the district court "submitted the case to the jury on issues other than those defined and limited by the pre-trial order." The pre-trial order simply indicated that "all the issues of fact and law to be raised at the second trial of this action have previously been raised at the first."

Mosley's proof involved substantially the same factors on both trials. To the extent that there was any variation, the district court properly modified the pre-trial order pursuant to Rule 14, of the Calendar Rules of the United States District Court for the Southern District of New York.

There is nothing in the charge of the district court concerning the hook used by Mosley that conflicts with this court's opinion in *Mosley* v. *Cia. Mar. Adra, S.A., supra.*

II.

The jury returned a verdict in favor of the stevedore company, in the third party action brought by the shipowner for indemnity. The district court set aside the verdict and granted judgment n.o.v. to the shipowner.

The stevedore company claims that Cia. Mar. Adra did not move for a directed verdict on the third party complaint and therefore could not properly make an n.o.v. motion. See 5 Moore, *Federal Practice* ¶50.08 (2d ed. 1964).

Appendix B

At the conclusion of all the evidence, Lipsett Steel sought dismissal of the third party complaint:

> "on the ground that there is no proof that the third-party defendant failed to perform its contract properly. * * *"

Cia. Mar. Adra's counsel stated:

> "Your Honor, the defendant renews its motion to dismiss the complaint and for a directed verdict on the ground that the evidence *is insufficient on which to go to the jury on any of these issues that have been raised in this case.*" (Emphasis added.)

This motion, although somewhat ambiguous, preserved Cia. Mar. Adra's right to make an n.o.v. motion.

The requirement of Rule 50(b) of the Federal Rules of Civil Procedure,* that a directed verdict motion must precede an n.o.v. motion is harsh in any circumstances. Especially where, as here, three parties are involved, where the attention of the defend-

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* Rule 50(b) of the Federal Rules of Civil Procedure reads in relevant part:

> "(b) MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT. Whenever a motion for a directed verdict made at the close of all the evidence is denied or for any reason is not granted, the court is deemed to have submitted the action to the jury subject to a later determination of the legal questions raised by the motion. Not later than 10 days after entry of judgment, a party who has moved for a directed verdict may move to have the verdict and any judgment entered thereon set aside and to have judgment entered in accordance with his motion for a directed verdict; or if a verdict was not returned such party, within 10 days after the jury has been discharged, may move for judgment in accordance with his motion for a directed verdict."

ant's counsel is focused on the plaintiff, his primary adversary, and where there are the complications which must attend a trial of this type, a motion such as that made by counsel should not be read narrowly, so as to penalize the client but rather should be read in light of the purpose of the Federal Rules to "secure the just, speedy, and inexpensive determination of every action."

Cia. Mar. Adra in a memorandum in support of its n.o.v. motion expressly pointed out to the district court that a motion for a directed verdict had been made. Lipsett Steel in its memorandum of opposition did not dispute this claim. The fact that Lipsett Steel did not take exception to the n.o.v. motion suggests that Cia. Mar. Adra's directed verdict motion was accepted as covering the indemnity issue.

On the merits of the n.o.v. motion, the trial judge ruled that "any seaworthy condition obtaining in the 'tween deck area was created by the stevedore . . ." A stevedore company is liable for indemnity if it creates an unseaworthy condition, or if it fails to eliminate a known risk created by another. See *Mortensen* v. *A/S Glittre,* 348 F. 2d 383, 385 (2d Cir. 1965). Since Lipsett furnished and rigged the chute, and controlled all other relevant aspects of the loading, the jury would have to find that the stevedore company was liable for a breach of its warranty of workmanlike service. See, e.g., *Italia Societa* v. *Oregon Stevedoring Co.,* 376 U.S. 315, 318-24 (1964); *Crumady* v. *The J. H. Fisser,* 358 U.S. 423, 428-29 (1950); *Ryan Stevedoring Co.* v. *Pan-Atlantic S.S. Corp.,* 350 U.S. 124, 133-34 (1956).

Affirmed.

Appendix B

FRIENDLY, *Circuit Judge* (dissenting):

Deeply regretting the necessity, I see no alternative to sending this case back for a third trial in which, hopefully, the jury may be given a proper charge. Despite views last expressed in *Skibinski* v. *Waterman S.S. Corp.*, —— F. 2d ——, —— (1966) (dissenting opinion), slip opinions 1397, 1404, I agree that Mosley was entitled to go to the jury on the issue of inadequate lighting; although the cases generally cited to this point concerned failure to supply lighting at night, *Mollica* v. *Compania Sud-Americana de Vapores*, 202 F. 8d 25, 27 (2 Cir.), cert. denied, 345 U.S. 965 (1953); *Ross* v. *S.S. Zeeland*, 240 F. 2d 820, 822-23 (4 Cir. 1957), the jury could properly have found that the stevedores had created on October 14 a condition of permanent night in the 'tween deck of the #5 hatch. Cf. *Robillard* v. *A. L. Burbank & Co.*, 186 F. Supp. 193 (S. D. N. Y. 1960). Whether the form of the chute afforded any basis for a finding of unseaworthiness is decidedly questionable; we have been pointed to no evidence that its configuration departed from the norm, and the tapering must have served a useful purpose in decelerating the falling scrap. However, the jury was permitted to find unseaworthiness not only on these accounts but on the basis of "the type of operation that was going on" and "the condition of the deck"—activities and results being currently created by Mosley's employer, Lipsett, in the work it was hired to perform. Metal scrap can hardly be loaded so as to leave a 'tween deck entirely spick and span; if Lipsett exceeded permissible limits of messiness, this went to its negligence but not to the

seaworthiness of the ship. Cf. *Morales* v. *City of Galveston,* 370 U. S. 165 (1962). In granting the ship's motion for judgment n.o.v. against Lipsett, the judge recognized that the absence of lighting might be "the only unseaworthiness," yet his instruction permitted the jury to find against the ship not only on that permissible ground but on impermissible ones. The same rule of law applied in our prior decision requires a new trial.

Appendix C

UNITED STATES COURT OF APPEALS

FOR THE

SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the sixteenth day of June one thousand nine hundred and sixty-six.

Present:

HON. HENRY J. FRIENDLY,
HON. PAUL R. HAYS,
HON. WILFRED FEINBERG,
Circuit Judges.

SAMUEL MOSLEY,
Plaintiff-Appellee,

v.

CIA. MAR. ADRA S.A.,
Defendant and Third-Party
Plaintiff-Appelant-Appellee,

LIPSETT STEEL PRODUCTS, INC.,
Third-Party Defendant-Appellant.

Appeal from the United States District Court for the Southern District of New York.

Appendix C

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is affirmed with costs to the plaintiff-appellee, Samuel Mosley, and to third party plaintiff-appellee Cia. Mar. Adra S.A.

A. DAVID FUSARO
Clerk

JOHN F. DAVIS, CLERK

Supreme Court of the United States

OCTOBER TERM, 1966

No. 498

SAMUEL MOSLEY,
Respondent,
—against—
CIA. MAR. ADRA S.A.,
Respondent,
—against—
LIPSETT STEEL PRODUCTS, INC.,
Petitioner.

No. 550

CIA. MAR. ADRA S.A.,
Petitioner,
—against—
SAMUEL MOSLEY,
Respondent,
—against—
LIPSETT STEEL PRODUCTS, INC.,
Respondent.

BRIEF OF RESPONDENT SAMUEL MOSLEY IN OPPOSITION

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Supreme Court of the United States

OCTOBER TERM, 1966

No. 498

SAMUEL MOSLEY,
Respondent,

—against—

CIA. MAR. ADRA S.A.,
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—against—

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BRIEF OF RESPONDENT SAMUEL MOSLEY IN OPPOSITION

Question Presented as to the Respondent Mosley

Does the shipowner's obligation of seaworthiness to a longshoreman during loading require that the work-

ing place "be reasonably fit to permit [him] to perform his work with reasonable safety"?

Statement

Petitioner Lipsett contracted to load the Liberian ship TURMOIL with a cargo of steel scrap. In loading No. 5 'tween deck space a mound of scrap metal extending inboard about 3 feet from the square of the hatch was built up leaving just enough space for Lipsett to run its chute between the top of the mound and the bottom of the main deck hatch coaming which extended about 2 feet into the 'tween deck area. The chute utilizing the force of gravity loaded the 'tween deck area surrounding the mound section by section; it was supported, positioned and moved by the ship's gear on the main deck. A shore side crane reached over the top of No. 5 hatch and dumped scrap of various sizes and irregular shapes into the chute which was unable to accommodate all the scrap fed to it, some of the scrap overflowed its sides extending the height of the mound and its base; some pieces were of such size and shape that they could not pass through its mouth or the bottom. The chief officer refused to enter the 'tween deck area during the loading because it is "dangerous", the scrap "will fall off", "it goes around where they load", it "bounces" and "ricochets around". Thus scrap metal accumulated outside the area the chute was positioned to load.

It was Mosley's job to direct the positioning of the chute from the 'tween deck area and to remain there during loading to free the chute of large pieces of scrap which from time to time became stuck in it.

On the day Mosley was injured the after offshore corner was loaded first; the chute was then moved forward about 2 feet to load the adjacent area. After loading resumed the chute was obstructed by "a piece of transmission or the rear end of a car" which was too big to pass between the end of the chute and its supporting bridle. Mosely picked up an "improvised hook" 5 or 6 feet in length, ¾ of an inch thick, the tool used to remove stuck scrap, approached the side of the chute as its mouth or lip was tilted upward "over a deck littered with scrap, tried to secure an adequate footing but due to darkness could not see whether the scrap on which he was standing was firm or loose, reached upward and forward with an improvised hook, started to pull on a piece of scrap lodged in the narrow end of a tapered chute, and fell backwards when his footing gave way.", (MacMahon, D. J., p. 29*).

The scrap on which Mosley tried to secure an adequate footing was made up of pieces of scrap of irregular size and shape which made an unlevel surface; in fact "the deck was so cluttered that it was a hazardous floor for the task assigned to plaintiff." (MacMahon, D. J., p. 29). Mosley did not continue to pull on the struck piece with all his might as Petitioners assert; when the scrap under his feet gave way he had to hold onto the hook to support himself and when it came off the piece of scrap he fell.

Mosley did not have sufficient light to obtain the best footing the scrap metal offered. The Trial Judge

* The numerals following p. indicate the pages of Lipsett's Petition.

said, "We think the jury could reasonably have found that the lighting was so poor as to constitute an unseaworthy condition and the proximate cause of plaintiff's injuries. There was ample evidence that the daylight was all but blocked out of the hold by intense dust, the large intruding chute, the overhead magnet, and the high pile of scrap pyramided almost to the bottom of the coaming which framed the square of the hatch." (MacMahon, D. J., p. 29). Although Respondent Adra called the chief officer to prove that the ship had portable lighting equipment aboard and he entered No. 5 'tween deck area to check the stowage, he remained silent as to the condition of the light and did not refute plaitniff's testimony that he used a flashlight when there.

The Trial Judge charged the jury that there was no defect in the hook Mosley used and to remove it from there "thinking" in determining seaworthiness.

The case was tried and submitted to the jury on the premise that the factors complained of each contributed to the unseaworthiness of the working area. In a post-trial decision the Trial Judge said:

> "The jury could also have reasonably found that the chute was tapered too narrow at the bottom for the size of some of the pieces of scrap and therefore unfit for its intended purpose; that the deck was so cluttered that it was a hazardous floor for the task assigned to plaintiff; that the primary method of clearing the chute was itself unsafe; or that any of these factors—the darkness, the chute, the size of the lodged piece of scrap, the littered deck, the method of clearing the

chute—operated in combination, *Kray* v. *United States,* 123 F. 2d 1008, 1010 (2d Cir. 1941), to create an unseaworthy condition." (p. 29, 30).

Reasons for Denial of the Writ as to the Respondent Samuel Mosley

1. The shipowner's obligation of seaworthiness to a longshoreman during loading was properly charged by the Trial Court in conformity with principles pronounced by this Court.

The shipowner's obligation of seaworthiness was precisely tailored and cast in the definition and language pronounced by this Court in *Mitchell* v. *Trawler Racer, Inc.,* 362 U S 539, 550, when the Trial Court charged:

> "* * * The law requires that a ship with all its appliances and appurtenances be reasonably fit for their intended use. Now, the standard isn't perfection. The law doesn't require an accident-free ship, but it does require that the ship and all its appurtenances be reasonably fit for their intended use."

The Court then drew into focus the reasonable fitness of the working place for the work Mosley was required to perform in the light of all the surrounding circumstances by charging:

> "Specifically here the question which you have to decide is whether under all the circumstances the 'tween deck area was reasonably fit to permit the plaintiff to perform his work with reasonable safety. And here you have to take into considera-

tion all of the conditions then obtaining, the type of operation that was going on, the lighting conditions, the chute, the kind of chute it was, the condition of the deck."

* * * *

"But consider all the conditions and decide whether under all of those conditions that area was reasonably fit for the plaintiff to perform his work in the task assigned to him with reasonable safety."

* * * *

"On the other hand, if you find that it was unfit, that it was not reasonably fit and reasonably safe, then you should find that it was unseaworthy, * * *"

That charge has the approval of *Atlantic & Gulf Stevedores* v. *Ellerman Lines,* 369 U S 355, 363, where a longshoreman recovered a judgment against the shipowner for negligence and the unseaworthiness of the working place during unloading; in considering the right of the shipowner to indemnification from the employing stevedore this Court sanctioned a jury charge which it said was vital to the issue before it, and fixed the stevedore's obligation to discharge the cargo in a reasonably safe and seaworthy manner [the source of the shipowner's liability] on "the totality of the circumstances".

Unseaworthiness does not rest solely on the unfitness of the ship, its gear and equipment, as Petitioners contend, but "might arise from any number of individualized circumstances" including "The method of loading her cargo or the manner of its stowage",

Morales v. *Galveston,* 370 U S 165, 170. *Gutierrez* v. *Waterman Steamship Corporation,* 373 U S 206, 213, which imposed unseaworthiness liability on the ship for the escape of beans on the dock from defective bags in which they were shipped, promulgated the same rule and stated that unseaworthiness "includes fitness for loading and unloading". The unloading itself may be proper and yet create a condtion of unfitness (slime and fish gurry on the ship's rail) which a jury may find an unseaworthy condition, *Mitchell* v. *Trawler Racer* (supra). Thus the scrap littered deck standing alone, without the proof that it was brought about by the hazardous loading method adopted and the inadequate chute, and that its hazards were increased by insufficient light, was sufficient to present a jury issue of reasonable fitness or seaworthiness. The reasonable fitness of the working place as a whole controls, for "In defining unseaworthiness", the "focus is upon the resulting condition of the ship," *Skibinski* v. *Waterman Steamship Corp.* (CA 2, 1966), 360 Fed. 2d. 539, 542. The shipowner's obligation of seaworthiness is designed to afford protection against "The risks themselves [which] arise from and are incident in fact to the service," *Seas Shipping Co.* v. *Sieracki,* 328 U.S. 85, 95. The decisions of this Court clearly establish that the seaworthiness doctrine protects the longshoreman from all the risks incident to his service of the ship except those which arise out of a working place "reasonably fit to permit [him] to perform his work with reasonable safety". Thus *Sieracki* at pages 95, 96 clearly equates the obligation of seaworthiness with that of a reasonably safe place in which to work as does *Mahnich* v. *Southern S.S. Co.,* 321 U.S. 96, 102. As this Court noted in *Michalic* v.

Cleveland Tankers, 364 U.S. 325, 327, 328, the only difference between the shipowner's obligation of seaworthiness and his obligation to provide a safe place in which to work under the Jones Act is that the exercise of "due care" will discharge the latter obligation but not the former; otherwise the factual basis of liability is the same.

2. The holding of the United States Court of Appeals for the Second Circuit, that the working place must "be reasonably fit to permit [the longshoreman] to perform his work with reasonable safety" is not in conflict with the holdings of other United States Courts of Appeals.

Petitioners do not cite a single case enunciating a contrary rule or condemning the principle of the holding below. *Arena* v. *Luckenbach S. S. Co.* (CA 1), 279 F.2d 186 turned on the "operational negligence" of the stevedore and the availability of proper equipment for loading; *McKnight* v. *N. M. Patterson & Sons* (CA 6), 286 F.2d 250, posed the question whether a shore based crane came within the warranty of seaworthiness; *Waldron* v. *Moore-McCormack Lines* (CA 2), 356 F.2d 247, involved an improvident order of a competent ship's officer; *Spann* v. *Lauritzen* (CA 3), 344 F.2d 204 raised the question of whether a longshoreman operating a shore based hopper used in unloading came within the warranty of seaworthiness; *Huff* v. *Matson Navigation Co.* (CA 9), 338 F.2d 205, presented a similar question; *Ballwanz* v. *Isthmian Lines, Inc.* (CA 4), 319 F.2d 457 involved the seaworthiness of a wire sling which was too stiff to hold a wooden spreader; *McQuiston* v. *Freighter & Tankers SS. Co.*

(CA 5), 327 F.2d 746, involved the size of shovels used in unloading; *Skibinski* v. *Waterman S. S. Corp.* (supra), involved the use of an "open mouth hook" when a suitable hook was available and impressed liability because of the resulting unsafe condition of the working place; *Radovich* v. *Cunard S. A. Co.* (CA 2), decided July 18, 1966, —— F.2d., —— involved the use of a single purchase fall or rope which was insufficient for the weight of a car, like *Arena, Skibinski* and *Waldron* the case raised the issue of whether "operational negligence" on the part of the longshoremen or seamen can create unseaworthiness. *Freitas* v. *Pacific Atlantic Steamship Company* (CA 9) 218 F.2d 562, 563, involved solely the unseaworthiness of a strongback and its locking device; dismissal was affirmed because there was no proof that the appliances were defective. *Kent* v. *Shell Oil Company* (CA 5), 286 F.2d 746, 752, decided that a barge and its appurtenances were not a causative factor when a truck driver sustained an injury on the dock during loading, that the tort being non-maritime came within the purview of the Louisiana Compensation Statute which denied recovery against a third party on any ground including unseaworthiness. The Court's language on unseaworthiness, which Petitioner Cia. Mar. Adra S. A. quotes, refers only to ship's gear as the case was based solely on skids alleged to be defective; though sound the language is dicta. *De Gioia* v. *United States Lines Company* (CA 2), 304 F.2d 421, 423-461, clearly stands for the principle proclaimed below, for it equates seaworthiness with a safe working place in deciding that a deck "strewn with a tangle of loose wire lashings, shackles, dunnage, and other objects" breached the stevedores' warranty of work-

manlike service and imposed on the shipowner the dual liability of unseaworthiness and an unsafe working place. *Cox* v. *Esso Shipping Company* (CA 5), 247 F.2d 629, 637, adopted by this Court in *Michalic* v. *Cleveland Tankers* (supra) decided that the shipowner's obligation to provide "reasonably suitable appliances", can be discharged by the exercise of due diligence in a Jones Act count but not in one grounded on unseaworthiness where the duty is absolute. Thus both obligations rest on the same basis of liability, but only Jones Act liability may be relieved by the exercise of due diligence. In *Cox* the trial judge did not make that distinction clear; below there was no such confusion for the cause was tried and properly submitted solely on the ground of unseaworthiness.

Whatever conflict some of these cases may have with one another or with principles proclaimed by this Court, not one of them is in conflict with the rule of this case.

Conclusion

For the reasons stated, a writ of certiorari should be denied.

Respectfully submitted,

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Supreme Court of the United States

OCTOBER TERM, 1966

No. 498

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Respondent,

—against—

CIA. MAR. ADRA S.A.,
Respondent,

—against—

LIPSETT STEEL PRODUCTS, INC.,
Petitioner.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF OF RESPONDENT CIA. MAR. ADRA S.A., IN OPPOSITION

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BRIEF OF RESPONDENT CIA. MAR. ADRA S.A., IN OPPOSITION

Opinions Below

The memorandum opinion of the District Court (App. B. of Petition) is not reported. The opinion of the Court of Appeals for the Second Circuit, and the dissenting opinion (App. A. of Petition) are reported at 362 F.2d 118.

Jurisdiction

It is not disputed that there is jurisdiction under 28 U.S.C. 1254(1). However, under the facts of this case and the applicable law, there are no valid reasons for the granting of a writ as prescribed by Rule 19 of the Rules of this Court.

Statement

This litigation concerns an accident to a longshoreman which was sustained during the course of a loading operation which was being conducted aboard respondent's vessel by petitioner, the injured longshoreman's employer. The cargo being loaded was loose scrap metal of varying sizes and shapes. The loading was conducted by dropping the scrap metal into a semi circular steel chute which was suspended on an incline from the main deck into the hatch opening. The scrap was caused by gravity to slide down the chute and off onto the deck in the particular section of the hatch toward which the lower part of the chute was directed.

It is undisputed that the chute, which was some 35 to 40 feet in length, and wider at the top than at the bottom, was furnished by petitioner; that petitioner by its employees including the injured longshoreman, was conducting the loading operation; that the petitioner's employees had rigged the chute prior to the accident and that:

> "According to the proof herein, no defect or unfitness in the hull, gear, machinery, or appurtenances of the ship directly visited harm on the plaintiff longshoreman. * * *" (Pet. p. 6)

It is further undisputed that petitioner controlled all the relevant aspects of the loading. Ship's officers went into the hatch occasionally only in order "to see that the ship was trimmed properly", to protect against damage and observe while "a position run"

was made when the position of the chute was changed. (Pet. p. 7). It is also not disputed that on the day previous to the accident petitioner loaded scrap metal into the hatch square to such a height that it cut off some of the natural light in the wings of the hatch where the stowing was being done on the day of the accident.

The accident in question occurred after loading of the scrap metal had gone on for some two hours in the 'tween deck of the #5 hatch of the SS TURMOIL. Shortly before the accident, some scrap metal which appeared to be the rear end of an automobile became jammed in the chute. The injured longshoreman who had been in the 'tween deck during the entire time that day and whose duty it was to see that the loading was done properly and to dislodge any scrap which might become trapped in the chute, decided to walk over to the chute and investigate the cause of the jamming and dislodge the trapped scrap metal. He picked up a piece of scrap metal which the longshoreman had fashioned into a hook and proceeded to the chute, walking over scrap metal which had fallen on the deck during the course of the loading operation. When he reached the chute, he placed the improvised hook around a part of the automobile rear end and commenced to pull in an attempt to dislodge the automobile rear end by pulling it over the side of the chute. As he continued to pull, his feet slipped on the scrap metal on which he had positioned himself and he fell.

The injured longshoreman sued the shipowner for damages claming negligence and breach of warranty of seaworthiness. The first trial resulted in a jury

verdict for the plaintiff on unseaworthiness and a jury verdict awarding the respondent-shipowner indemnity against the petitioner. The claim based on negligence was dismissed.

The judgment in plaintiff's favor was reversed by the Court of Appeals and the case remanded for a new trial. (314 F.2d 223). Certiorari was denied (375 U.S. 829).

On retrial, the case against the shipowner was submitted to the jury only on unseaworthiness. The jury returned a verdict in plaintiff's favor against the respondent-shipowner but denied indemnity to the shipowner against petitioner-stevedore.

Following the rendition of the jury verdict, respondent made timely application for judgment notwithstanding the jury verdict and the trial judge granted the motion. In granting judgment notwithstanding the verdict, the District Court upheld the respondent-shipowner's contentions that it was entitled to indemnity as a matter of law, stating:

> "Defendant's third contention is that it is entitled to indemnity as a matter of law. With this contention, we wholly agree. The law is clear that a stevedore is liable over if he himself created the unseaworthy condition, or if the performance of a workmanlike job called for the elimination of a known risk created by another. Mortensen v. A/B Glittre, 348 F.2d 383, 385 (2d Cir.1965); Albanese v. M.V. Nedorl, Amerik Stoomv, Maata., 346 F.2d 481, 484 (2d Cir.), rev'd on other grounds, 34 U.S.L. Week 3217 (Dec. 13, 1965). Here, there

> is no question but that any unseaworthy condition obtaining in the tween deck area was created by the stevedore and that the verdict in its favor is against the weight of the evidence. Even if we assume that the absence of lighting was the only unseaworthiness and that this condition was in its inception wholly attributable to the owner's failure to provide internal lights, the stevedore could and should have corrected it. There was uncontradicted evidence that electrical outlets were installed in the hold where plaintiff was working and that, in another hold on an earlier day, the stevedore had made use of such an outlet to provide artificial illumination. In this regard, plaintiff's knowledge of inadequate lighting is imputable to his employer, third-party defendant. Mortensen v. A/S Glittre, supra. at 385."

The Court of Appeals affirmed the judgment of the District Court, stating:

> "On the merits of the n.o.v. motion, the trial judge ruled that 'any seaworthy condition obtaining in the 'tween deck area was created by the stevedore. . . .' A stevedore company is liable for indemnity if it creates an unseaworthy condition, or if it fails to eliminate a known risk created by another. See Mortensen v. A/S Glittre, 348 F.2d 383, 385 (2d Cir. 1965). Since Lipsett furnished and rigged the chute, and controlled all other relevant aspects of the loading, the jury would have to find that the stevedore company was liable for a breach of its warranty of workmanlike service. See, e.g., Italia Societa v. Oregon Stevedoring Co., 376 U.S. 315, 318-24 (1964);

Crumady v. The J. H. Fisser, 358 U.S. 423, 428-29 (1950); Ryan Stevedoring Co. v. Pan-Atlantic S.S. Corp., 350 U.S. 124, 133-34 (1956)."

The dissenting opinion of Judge Friendly was directed only to the appeal from the judgment awarded to plaintiff against the respondent-shipowner. It pointed out that the charge to the jury on unseaworthiness on the second trial violated the same rule which required reversal of the judgment entered in favor of the plaintiff in the first trial. It, however, did not deal with the question of indemnity.

Argument

Petitioner's insistance that the granting of judgment notwithstanding the verdict on the indemnity claim violated the Seventh Amendment does not transform this case into one warranting review by this Court on certiorari. Of the several issues sought to be raised, petitioner overlooks the fact that the judgment on indemnity was correct as a matter of law and no amount of strained semantics can excuse petitioner's failure to load and stow the cargo properly and safely and its failure to furnish and properly use needed equipment.

This case does not actually involve a violation of the right to a jury trial guaranteed by the Seventh Amendment to the Federal Constitution nor is a determination of any question here involved necessary in order to define the rights and duties of the Trial Judge in a jury trial or the requirements of Rule 50 (a) and (b) of the Federal Rules of Civil Procedure or the obliga-

tions of a shipowner and a stevedore under their respective warranties.

To focus attention on precisely what is offered as an issue for Supreme Court determination with respect to the third-party indemnity claim, it may be pointed out that the petitioner concedes that "According to the proof herein, no defect or unfitness in the hull, gear, machinery, or appurtenances of the ship directly visited harm on the plaintiff longshoreman" (Pet. p. 6), and it is undisputed that petitioner "furnished and rigged the chute, and controlled all other relevant aspects of the loading", (App. A. p. 25-26).

Petitioner nonetheless urges that it was error for the Trial Judge to set aside the jury verdict on indemnity and grant judgment notwithstanding the verdict because (1) the jury could have concluded that the scrap metal on which the plaintiff longshoreman was standing when he fell "was not an unseaworthy condition 'created by the stevedore' "; (2) that ship's personnel by virtue of their presence "to see that the ship was trimmed properly", and to protect against damage to the ship and during position runs after the chute was placed in position were constantly supervising the loading; and (3) that the motion for a directed verdict at the close of all the evidence was not directed against petitioner and that, if it was, it was defective in that it did not state the specific grounds therefor.

The requirement that the stevedore load cargo all over the deck does not absolve the petitioner of its well defined duty to stow the cargo safely and properly. The law does not recognize any distinction between fully loading a ship and loading it partially. Com-

petency and safety of stowage are inescapable elements of the service undertaken whether the load is to be partial or total.

The presence of ship's officers during the loading operation or their failure to discover or correct the stevedore's failure to stow the cargo properly is no bar to indemnity. The admitted reason for the presence of ship's personnel disposes of petitioner's tenuous argument that they were continually supervising the loading operation. In any event only such conduct of the shipowner as prevents or seriously handicaps the stevedore in his ability to do a workmanlike job precludes indemnity and there was no claim let alone evidence of any such conduct here.

The requirement that a motion for a directed verdict be made in order to authorize the Trial Judge to grant judgment n.o.v. obviously was met. Petitioner did not dispute this even though it was expressly pointed out to the District Court in the written memorandum in support of the motion for judgment notwithstanding the verdict.

On the facts of this case, the decision of the District Court was manifestly correct. There is no asserted conflict of decision nor in the light of the purpose of the Federal Rules of Civil Procedure is any other result proper. Manifestly there is no important question of Federal Law requiring decision by this Court.

In view of respondent, Cia. Mar. Adra's position on its appeal to the Court of Appeals on the jury verdict for the plaintiff longshoreman and the state of the law, respondent-shipowner does not disagree that the

charge to the jury on unseaworthiness was improper. It disagrees, however, that this affords a basis for a denial of indemnity as petitioner did not raise this issue on the appeal to the Court of Appeals nor join in the appeal of respondent-shipowner.

Petitioner is filing a petition for a writ of certiorari on the question of the propriety of the Court's charge on unseaworthiness with the prayer that it be granted in the event certiorari is granted in this case, No. 498.

I.

The Decision Below Is Clearly Correct

Following trial, respondent, Cia. Mar. Adra, made a timely motion for judgment notwithstanding the verdict or, in the alternative, for a new trial. The District Court concluded that respondent, Cia. Mar. Adra, was entitled to indemnity as a matter of law because "The law is clear that a stevedore is liable over if he himself created the unseaworthy condition, or if the performance of a workmanlike job called for the elimination of a known risk created by another * * *." (App. B. p. 30). While the District Court did indicate that it could not state on what ground the jury found the vessel unseaworthy, there was no room for any doubt that the plaintiff's accident resulted from the petitioner's breach of its warranty of workmanlike service. The Trial Judge said: "Here, there is no question but that any unseaworthy condition obtaining in the tween deck area was created by the stevedore * * *." (App. B. p. 30), and accordingly granted the motion for judgment notwithstanding the verdict.

Petitioner does not appear to question the validity of this finding as it concedes that "According to the proof herein, no defect or unfitness in the hull, gear, machinery or appurtenances of the ship directly visited harm on the plaintiff longshoreman". (Pet. p. 6).

Petitioner's basic contention seems to be that because the Trial Judge added the clause "and that the verdict in its favor is against the weight of the evidence" the granting of the motion for judgment notwithstanding the verdict must have been based on the Court's weighing the evidence and not because the verdict was contrary to law.

At the same time, the Trial Court had before it a motion in the alternative for a new trial. There is therefore the distinct possibility that the Judge's thinking on the weight of the evidence was directed to the alternative motion for a new trial. Construing the findings of the Trial Court in a most favorable light to petitioner, the granting of the motion for judgment notwithstanding the verdict was based on mutually exclusive grounds. This, however, does not constitute reversible error because: "[T]he rule is well settled that if the decision below is correct, it must be affirmed, although the lower court relied upon a wrong ground or gave a wrong reason". *Helvering* v. *Gowran,* (1937) 302 U.S. 238, 245.

The decision below was correct and the Court of Appeals, in affirming, was guided by this rule. After noting that on the merits of the n.o.v. motion, the Trial Court ruled that "any unseaworthy condition obtaining in the 'tween deck area was created by the stevedore * * *", the Court of Appeals expressly held:

> "A stevedore company is liable for indemnity if it creates an unseaworthy condition, or if it fails to eliminate a known risk created by another. See Mortensen v. A/S Glittre, 348 F.2d 383, 385 (2d Cir. 1965). Since Lipsett furnished and rigged the chute, and controlled all other relevant aspects of the loading, the jury would have to find that the stevedore company was liable for breach of its warranty of workmanlike service. See, e.g., Italia Societa v. Oregon Stevedoring Co., 376 U.S. 315, 318-24 (1964); Crumady v. The J.H. Fisser, 358 U.S. 423, 428-29 (1950); Ryan Stevedoring Co. v. Pan Atlantic S.S. Corp., 350 U.S. 124, 133-34 (1956)." (App. A pp. 25-26)

Petitioner's contention that the granting of judgment n.o.v. was contrary to the Seventh Amendment because the jury could have found that the scrap on which plaintiff slipped "was not an unseaworthy condition created by the stevedore" (Pet. p. 10), is mere semantics and clearly without merit.

Petitioner's position is in absolute conflict with the doctrine of warranty of workmanlike service. The law is well settled that the agreement to load a vessel obligates the stevedore to stow the cargo safely and properly, as competency and safety of stowage are inescapable elements of the service undertaken. *Ryan Stevedoring Co.* v. *Pan Atlantic S.S. Corp.*, (1955) 350 U.S. 124, 133. A stevedore is liable for indemnity not only if it creates an unseaworthy condition but also if it fails to eliminate an unseaworthy condition created by another, including the shipowner. *Mortensen* v. *A/S Glittre,* 2 Cir., 1965, 348 F.2d 383, 385. The

shipowner relies on the competency of the stevedore company and the stevedore is in a far better position than the shipowner to avoid the accident, *Italia Societa* v. *Oregon Stevedoring Co.*, 376 U.S. 315, 323. Under such circumstances a Trial Judge has not only the right but has the duty to direct a verdict where, as in the instant case, the facts are undisputed, the evidence is conclusive and the verdict is contrary to law. *Herron* v. *Southern Pacific Company,* (1931) 283 U.S. 91, 95-96. The decision below was unquestionably warranted by the facts of this case and the applicable law.

Turning to the subject of the motion for a directed verdict, it clearly preserved the right of the shipowner to make a motion for judgment n.o.v. and thus confer jurisdiction on the Trial Court to rule on that motion. As the Court of Appeals pointed out, all, including petitioner, accepted the motion for a directed verdict as covering the indemnity issue. Petitioner overlooks the fact that judgments are not to be set aside because there may be error in rulings unless it is clearly prejudicial. The burden to show such prejudice rests with petitioner and petitioner failed to carry this burden. Rule 61 F.R.C.P., *Palmer* v. *Hoffman,* 1943, 318 U.S. 109, 116. A judgment will not be reversed for mere technical errors so that it can be retried to reach the same result. It is well settled that it is not the purpose of the Federal Rules of Civil Procedure to permit a party to avoid a disposition of a case on its merits on the basis of mere technicalities. In *Foman* v. *Davis*, 1962, 371 U.S. 178, 181, this Court said:

"It is too late in the day and contrary to the

> spirit of the Federal Rules of Civil Procedure for decisions on the merits to be avoided on the basis of such mere technicalities. * * * Rules themselves provide that they are to be construed 'to secure the just, speedy, and inexpensive determination of every action.' Rule 1"

The Court of Appeals so applied that spirit of the Federal Rules when it said:

> "* * *, a motion such as that made by counsel should not be read narrowly, so as to penalize the client but rather should be read in light of the purpose of the Federal Rules to 'secure the just, speedy and inexpensive determination of every action.'" (App. A. 25)

The Trial Court's remark in colloquy with shipowner's counsel, after all the evidence was in that "All right, it is your case, not mine. If you haven't enough it is going to be your tough luck." (Pet. p. 8) was not directed to the evidence. As this colloquy shows, this remark resulted from an erroneous concept of law that indemnity was a matter of contract. The Court conceded that the shipowner had established "that the stevedore was on board and performed the work." Nonetheless, the Trial Court specifically asked: "It (indemnity) is a matter of contract, isnt't it?" (R. 352) When counsel sought to show that under the law indemnity was not a matter of contract and that the presence of the stevedore on board performing the work was all that was necessary, the Court said: "All right, it is your case, not mine. . . .". The law is well settled that indemnity is not dependent on proof of contract but is measured by the relationship which

brings it into play. *Crumady* v. *The Joachim Hendrick Fisser,* 358 U.S. 423, 428-429; *Waterman S.S. Corp.* v. *Dugan & McNamara,* 364 U.S. 421, 423-425; *Italia Societa* v. *Oregon Stevedoring Co.,* 376 U.S. 315. Furthermore, petitioner's answer expressly admitted that petitioner had contracted to load the ship with iron (Pet. p. 7).

The right to indemnity is not defeated by the fact that ship's officers were present to see that the ship was trimmed properly, to protect against damage and observe while a position run was made after the placement of the chute had been changed. (Pet. p. 7) Merely stating the reason for the presence of the ship's officers disposes of petitioner's tenuous argument that the ship's officers were exercising a continuous and regular supervision and control over the loading. *Puddu* v. *Royal Netherlands S.S. Co.,* 2 Cir., 1962, 303 F.2d 752, 754, cert. den. 371 U.S. 840, reh. den. 371 U.S. 917. Petitioner, however, is not relieved of its obligations under the warranty of workmanlike service by the failure of ship's personnel to discover and correct defects in the stowage, *Ryan Stevedoring Co.* v. *Pan Atlantic S.S. Corp.,* 1956, 350 U.S. 124, 134.

Insofar as the propriety of the charge on unseaworthiness is concerned, petitioner did not raise it in the Court of Appeals. Petitioner evidently was satisfied with the Trial Court's charge. Petitioner also did not join with respondent-shipowner in its appeal directed to that charge.

II.

There Is No Conflict of Decision

Petitioner asserts that judgment n.o.v. cannot be granted when the jury verdict is against the weight of the evidence but that a new trial may be granted citing several cases in support thereof.

Respondent does not dispute this principle of law and the fact that it must be applied in the proper circumstances. Where, as in the instant case, the facts are undisputed, conflicting inferences are absent and the evidence is conclusive the trial judge has the right and duty to direct a verdict, or to set aside the jury verdict if it is contrary to the evidence or the law. *Herron* v. *Southern Pacific Company,* 283 U.S. 91, 95-96. This is still the law, *New York, N.H. & H.R. Co.* v. *Hennigan,* 1960, 364 U.S. 441. In *Lavender* v. *Kurn,* 1946, 327 U.S. 645, this Court noted that only when there is an evidentiary basis for the jury's verdict that is there an invasion of the jury's function for a court to weigh the evidence.

The decision of this Court in *Atlantic & Gulf Stevedores* v. *Ellerman Lines, Ltd.,* 369 U.S. 355, does not require a different result than that reached by the Court below in this case. While this Court pointed out that a court may not search for a view of the case which will make the jury's finding inconsistent, it emphasized at the outset that it reached the result in that case because each possible ground of liability to the original plaintiff did not involve a breach of the petitioner's warranty as a matter of law. It said at page 364:

"We cannot say that petitioner was liable as a matter of law * * *"

In the instant case, the converse was true. Petitioner had the duty to stow the cargo properly and safely and could not use the failure of the shipowner to discover and correct the defect in stowage as a bar to indemnity. *Ryan Stevedoring Co. v. Pan Atlantic S.S. Corp.*, 350 U.S. 124. If the chute which was furnished for the loading of the scrap was defective or unfit for the purpose for which it was intended, the shipowner was entitled to indemnity because it "defers to the qualifications of the stevedoring contractor in the selection and use of equipment and relies on the competency of the stevedore company". *Italia Societa* v. *Oregon Stevedoring Co.*, 1964, 376 U.S. 314, 323. The stevedore's obligation to perform its services with reasonable safety extends not only to stowage and handling of cargo but also to the use of equipment incidental thereto including defective equipment supplied by the shipowner. *Italia Societa* v. *Oregon Stevedoring Co.*, 376 U.S. 315, 375-376; *Weyerhaeuser S.S. Co.* v. *Nacirema Operating Co.*, 355 U.S. 563; *Crumady* v. *Joachim Hendrick Fisser*, 358 U.S. 423. It is a breach of warranty of workmanlike service to use a dangerous method of loading and unloading cargo. *Waterman S.S. Corp.* v. *Dugan & McNamara Inc.*, 364 U.S. 421, 423. It is also a breach of warranty of workmanlike service to permit work to go on though the risk is created by another. *Mortensen* v. *A/S Glittre*, 2 Cir., 1965, 348 F.2d 383, 385.

The question of what conduct on the part of the shipowner precludes recovery which petitioner says was raised in *Weyerhaeuser* v. *Nacirema Operating*

Co., 355 U.S. 563, 567 was defined in *Albanese* v. *N.V. Nederl, Amerik. Stoomv., Maats,* 346 F.2d 481, reversed on other grounds 382 U.S. 283.

There is no conflict with respect to the application of Rule 50 (a) and (b) of the Federal Rules of Civil Procedure. The Court of Appeals below followed the decision of this Court in *Foman* v. *Davis,* 1962, 371 U.S. 178 and its decision was in conformity with this Court's holding in *Palmer* v. *Hoffman,* 318 U.S. 109.

Obviously, no conflict of decision exists which requires review by this Court on certiorari. Whatever confusion there may be results from petitioner's attempt to substitute discarded principles for well settled law to facts which do not exist in this case.

III.

There Is No Important Question of Federal Law

Petitioner asserts that there is a compelling need for this court to define the law on certain questions which it says lurk in this case. Except for decisions dealing with the shipowner's warranty of seaworthiness, there is no showing that the state of the law is such that definition and clarification is necessary. Mere fear of petitioner that confusion or uncertainty may arise does not clothe a question, if one actually exists, with sufficient importance to warrant review.

It is suggested that lawyers and judges could point to this case to demonstrate how far a trial court may go in substituting its judgment of the facts for the

judgment of the jury. The short answer to this is that judgment n.o.v. was granted not on the basis of the reevaluation of facts but purely because the jury's verdict was contrary to the law. The Court of Appeals expressly affirmed for this reason. It said:

> "* * * Since Lipsett furnished and rigged the chute, and controlled all other relevant aspects of the loading, the jury would have to find that the stevedore company was liable for a breach of its warranty of workmanlike service." (App. A p. 25-26)

It is also suggested that this case might be pointed to as demonstrating that the requirements of the Common Law and of FRCP Rule 50 a & b involve provisions which may be dispensed with in the discretion of the court. The short answer is that the provisions were not dispensed with but there was compliance and the Court of Appeals so found. It said:

> "This motion, although somewhat ambiguous, preserved Cia Mar Adra's right to make an n.o.v. motion." (App. A p. 24)

Inherent in the Court's finding is the fact that petitioner's objection, at best, was a mere technicality and did not warrant reversal of the judgment because the decision of the trial judge was correct on the law. It said:

> "* * *, a motion such as that made by counsel should not be read narrowly, so as to penalize the client but rather should be read in light of the purpose of the Federal Rules to secure the just, speedy and inexpensive determination of every action." (App. A p. 25)

The decision below was in conformity with the holding of this court in *Foman* v. *Davis,* 371 U.S. 178, 181 that it is contrary to the spirit of the Federal Rules of Civil Procedure for decisions on the merits to be avoided on the basis of mere technicalities.

It is further suggested that this case may be relied upon as demonstrating that the warranty of seaworthiness is not limited or defined by decisions of this court but is subject to unlimited enlargement by lower courts. While respondent shipowner believes that the charge to the jury was improper and contrary to the doctrine of the warranty of seaworthiness as defined by this Court and has filed a separate petition* seeking review should this petition be granted, the answer to petitioner's contention is that petitioner did not raise this question on its appeal to the Court of Appeals nor join with respondent shipowner in its appeal on this question.

Petitioner thus is not entitled to seek review on this basis nor challenge the indemnity award on the rather illogical argument that because petitioner believes that this charge to the jury was legally incorrect, petitioner is not liable for indemnity except when the shipowner is legally liable. Under such a concept a stevedore could just sit back until after the shipowner had exhausted all his remedies and then refuse indemnity on the ground that the basis on which the shipowner was held liable did not constitute "legal liability".

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* *Cia. Mar. Adra S.A.* v. *Samuel Mosley,* October 1966 Term No. 550.

Conclusion

For the following reasons it is respectfully submitted that this petition for a writ of certiorari should be denied.

Respectfully Submitted

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On Brief

OCT 1 1966

JOHN F. DAVIS, CLERK

Supreme Court of the United States

OCTOBER TERM, 1966

No. 498

SAMUEL MOSLEY,

Respondent,

against

CIA. MAR. ADRA S.A.,

Respondent,

against

LIPSETT STEEL PRODUCTS, INC.,

Petitioner.

PETITIONER'S REPLY TO BRIEF OF RESPONDENT CIA. MAR. ADRA S.A.

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VINCENT A. CATOGGIO,
On Petition.

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PETITIONER'S REPLY TO BRIEF OF RESPONDENT CIA. MAR. ADRA S.A.

Reply to Respondent Cia. Mar. Adra

In opposing certiorari Cia Mar Adra seems to concede that but for its erroneous representation to the trial court that it had made a motion for a directed verdict as to the third party complaint at the trial (brief p. 12), it would not have been granted judgment n.o.v. So too the Court of Appeals said:

> "Cia Mar Adra in a memorandum in support of its n.o.v. motion expressly pointed out to the district court that a motion for a directed verdict had been made."

Thus judgment n.o.v. is based on a representation made to the trial court which it thus seems to be conceded, was

untrue when it was made. Thus Cia Mar Adra in effect argues that making inaccurate, if not untrue representations to our courts should be rewarded.

If it ever is possible to dispense with a motion for a directed verdict as a mandatory prerequisite to granting judgment n.o.v., certainly it should not be done in a case such as this, where the trial court preempted the function of the jury by finding that

> "any unseaworthy condition * * * was created by the stevedore".

In finding for the petitioner, the jury had answered to the following which was the whole charge as to indemnity.

> "Now, if you find for the plaintiff against the ship, then we come to the second lawsuit. The ship says we didn't create this condition; this condition was created by the stevedores; they hold themselves out as experts; we had them on board conducting this loading operation, and if there was any unseaworthy condition they created it.
>
> The ship had the right to rely on the stevedores. It has no duty to inspect their work nor to correct faulty situations, but remember that if the stevedores created an unseaworthy condition the ship is stuck with it, but the ship in that (366) situation can recover over against the stevedores for all the loss and damages to which it has been put.
>
> So if you bring in a verdict, a verdict, for example, for X dollars for the plaintiff, then you come to the next lawsuit, and the stevedores would be responsible for X dollars if you find that it failed to carry out this loading in a workmanlike manner, and in this case that means that the stevedores created an unseaworthy condition."

Cia Mar Adra took no exception to this charge.

In the Court of Appeals decision, no mention is made that the question whether the petitioner created the unseaworthiness, so clearly was submitted to the jury. Cia Mar Adra's statements at pages 11, 12, 17 and 18 that the trial court did not substitute its judgment of the evidence for the verdict of the jury, are not in accord with the facts. The trial court left no room for doubt that it was passing on the facts when it said

> "the verdict in its favor is against the weight of the evidence."

Cia Mar Adra concedes in its petition in No. 550 that

> "the scrap metal was on the deck where it was supposed to be loaded,"

Since the charge on unseaworthiness told the jury that they could find unseaworthiness because of

> "the condition of the deck"

it was reasonable and logical for the jury to decide that the petitioner was not responsible for the scrap being on the deck but that Cia Mar Adra was. There is no less reason or logic to the jury's verdict in favor of petitioner than there is to what this court said in *Weyerhauser S.S. Co., Nacirema Operating Co.*, 355 U. S. 563 at 567 that a shipowner only is entitled to indemnity when there is no

> "conduct on its part sufficient to preclude recovery."

Clearly the shipowner Cia Mar Adra caused and required the scrap to be loaded on the deck.

In an effort to forestall the granting of certiorari, Cia Mar futilely states at pages 9, 14 and 19 that the petitioner did not question the propriety of the charge on unseaworthiness in the Court of Appeals. Reference to Point

III of the petition for rehearing filed by the petitioner in that court shows that the heading was

> "The charge herein as to unseaworthiness which enlarged the sphere of a ship's liability far beyond that provided for in any Supreme Court decision was not a proper basis on which to bottom indemnity."

Of course both the majority and dissenting opinions discussed the charge of unseaworthiness and expressed views as to its propriety. Thus we again find Cia Mar Adra's statements to be in error.

Dated: New York, N. Y., September 29, 1966.

Respectfully submitted,

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VINCENT A. CATOGGIO,
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PETITIONER'S REPLY TO BRIEF OF RESPONDENT MOSLEY

Reply to Respondent Mosley

Respondent Mosley, cites *Mahnich* v. *Southern S.S. Co.*, 321 U. S. 96, in support of the proposition that this court has equated a duty to provide a safe place to work with the obligation of seaworthiness. A study of the opinion in that case, as well as other decisions of this court in cases involving the question of what constitutes unseaworthiness reveals that a defect in an appliance or appurtenance to the ship is a prerequisite to unseaworthiness. That holding repeatedly and consistently has been made by this court with apparent meticulous and studied care.

Typical is the language used in *Mahnich* v. *Southern S.S. Co.*, 321 U. S. 96 at page 103:

> "The staging from which petitioner fell was an appliance appurtenant to the ship. It was unseaworthy in the sense that it was inadequate for the purpose for which it was ordinarily used, because of the defective rope with which it was rigged. Its inadequacy rendered it unseaworthy, whether the mate's failure to observe the defect was negligent or unavoidable."

In *Gutierrez* v. *Waterman S.S. Corp.*, 373 U. S. 206, this court said at page 213:

> "These cases all reveal a proper application of the seaworthiness doctrine, which is in essence that things about a ship, whether the hull, the decks, the machinery, the tools furnished, the stowage, or the cargo containers, must be reasonably fit for the purpose for which they are to be used. See Mitchell v. Trawler Racer, Inc., 362 U. S. 539, 550, 4 L ed 2d 941, 948, 80 S Ct 926; Morales v. Galveston, 370 U. S. 165, 169, 172, 8 L ed 2d 412, 415, 417, 82 S Ct 1226 (dissenting opinion)."

In *Mitchell* v. *Trawler Racer*, 362 U. S. 539, it is indicated that unseaworthiness would have to rest on the condition of the ship's rail.

In *Morales* v. *City of Galveston*, 370 U. S. 165, longshoremen while trimming wheat loaded on a ship were overcome in the hold by fumes from a chemical insecticide which had been sprayed on the wheat. Clearly the place where these longshoremen were working, was an unsafe place. This court said at page 170:

> "* * * What caused injury in the present case, however, was not the ship, its appurtenances, or its crew, but the isolated and completely unforeseeable intro-

duction of a noxious agent from without. The trier of the facts ruled, under proper criteria, that the Grelmarion was not in any manner unfit for the service to which she was to be put and we cannot say that his determination was wrong."

The Justices who dissented did not suggest that the vessel was unseaworthy because the longshoremen had been provided an unsafe place to work, but they said instead at page 171:

> "The vessel's cargo spaces were not equipped with a forced ventilation system. Grain vessels, the district court found, rarely are so equipped; and it is concluded that forced ventilation 'is not necessary or customary.' If this were an isolated instance of fumigated grain releasing noxious gases, no claim of unseaworthiness could be maintained.
>
> * * * * * *
>
> A vessel without a forced ventilation system would be seaworthy if this injury were an unexpected isolated occurrence. * * * Unseaworthiness by reason of the absence of a forced ventilation system is clearer here than it was in Mitchell v. Trawler Racer Inc., 362 U. S. 539. * * *"

The contents of respondent Mosley's brief only serves to focus attention on the rampant uncertainty and confusion which exists as to what constitutes unseaworthiness. It adds emphasis to the urgent need for clarification of the rule.

Dated: New York, N. Y., September 29, 1966.

Respectfully submitted,

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On petition.